Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

BENJAMIN FRANK RAMSEY; WILLIAM BOYD; GERALD ECKEL; ELZIE HALSEY; LUCIAN JOHNSON; BRUCE MAYBRIAR, on behalf of themselves and all members of the putative class,

Petitioners,

v.

FORMICA CORPORATION; SCOTT A. SMITH; EDWARD R. CASE; EARL M. BENNETT; FRANK A. RIDDICK, III,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a writ of certiorari necessary to resolve the disarray among the circuits on the issue addressed by the United States as *amicus* and noted but not decided by this Court in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), as to the scope of relief available under section 502(a)(3) of ERISA which provides for an award of "other appropriate equitable relief" to redress violations under that Act?

2. Is ERISA's preemptive force so broad as to preempt state law claims for negligent misrepresentation and promissory estoppel which do not require interpretation or application of a benefit plan and thereby deprive participants such as Petitioners of any meaningful remedy for Formica's admitted negligence which resulted in the miscalculation of the amounts of hundreds of monthly pension benefits used to induce employees to accept early retirement and the payment of such erroneous benefits for as long as seventeen years?

PARTIES TO THE PROCEEDING

Petitioners include the following individuals: Benjamin Frank Ramsey, William Boyd, Gerald Eckel, Elzie Halsey, Lucian Johnson, and Bruce Maybriar.

The Respondent is Formica Corporation, et al.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A at 1a-9a) is reported at 398 F.3d 421 (6th Cir. 2005). The opinion of the district court (App. C at 12a-21a) is unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on February 9, 2005. (App. B at 10a-12a). The Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)), provides, in pertinent part, as follows:

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought –
>
> *****
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3) (emphasis added).

Section 513(a) of ERISA (29 U.S.C. § 1144(a), provides, in pertinent part, as follows:

> **(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (emphasis added).

STATEMENT OF THE CASE

Petitioners are retirees from Formica Corporation ("Formica"). Petitioners' average age is approximately 70. Petitioners receive monthly pension benefits from the Formica Corporation Employee Retirement Plan ("The Plan"), an employer sponsored defined benefit plan.

Formica offered early retirement incentive packages in 1986, 1991 and 1996. In each of those years groups of Formica employees, including Petitioners, were presented with proposed early retirement packages. To inform the employees of the value of the retirement programs, Formica provided early retirement "kits" containing descriptions of the incentives being offered as well as statements individually tailored to each employee comparing the amount of his or her monthly pension benefit if early retirement was accepted with the amount of the benefit if retirement was delayed until age 62. The employees were given no reason to question the

accuracy of the data or retirement figures provided to them by Formica. The monthly pension benefit amounts were arrived at entirely by means of mathematical computations based upon numerical demographics (e.g. an employee's date of birth, date of hire, etc.).

Formica utilized written scripts when presenting the statements denominated as "estimates," including a script that advised potential early retirees:

> We [Formica] want you to make up your own mind about the Program, based on solid information not misinformation. After all, your decision can have far-reaching consequences. You may even want to discuss the Program with a professional tax advisor. (emphasis in original).

The only notation of any possible change in the amount of monthly benefits was that changes in the Plan's provisions or social security law could have some impact. However, neither of these conditions ever materialized or affected the amount of the monthly benefit payments received by the employees.

Employees who accepted early retirement based on the representations made by Formica began receiving payments in amounts totally consistent with those representations. These benefits continued to be paid as promised on a monthly basis, in some instances for as long as 17 years.

In January 2004 Petitioners were informed by way of written notices that Formica had determined that the monthly benefits received for as long as 17 years by 295 of the retirees had been based upon erroneous calculations. According to Formica, these retirees had been overpaid in various amounts

totaling $1,495,000.00. The errors were solely attributable to Formica and its employees. A letter to the IRS from Formica's counsel describes the errors as "operational failures" on the part of Formica, the Plan sponsor, that were the result of rank incompetence and negligence by Formica and its employees.[1]

The January 2004 notice advised Petitioners that effective immediately (i.e. January 2004), their monthly benefits would be reduced and that Formica was considering whether to take steps to recoup the overpayments. More than half of the reductions were greater than $25 per month and some of the reductions were in excess of $150 per month. Petitioners were given no prior notice of these reductions, nor were they provided any opportunity to challenge the accuracy or

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[1] Formica, through its attorneys, explained the various miscalculations as follows:

The Plan Sponsor [Formica] believes a former employee gave, in error, the wrong instructions to the payroll provider (App. 53a)

The Plan Sponsor [Formica] failed to ensure that responsible employees fully understood the terms of the Plan (App. 58a);

The Plan Sponsor [Formica] did not properly calculate [benefit offsets] due the (sic) accuracy of its own benefit data . . . and its misunderstanding of how such Offset Amounts were calculated" (App. 63a);

The Plan Sponsor's [Formica's] Human Resources Department did not realize that formal plan amendments were required for early retirement window programs (App. 67a-68a); and

The Plan Sponsor [Formica] did not properly calculate ages due to human error" (App. 69a).

propriety of these reductions prior to their effective date.[2] Formica informed Petitioners that their sole recourse to challenge these reductions was to file an administrative appeal under the auspices of ERISA. The process according to the notice was likely to take at least six months to complete.

On February 20, 2004, filed a lawsuit in state court asserting common law claims for negligent misrepresentation and promissory estoppel. Petitioners also sought injunctive relief enjoining the reductions in their monthly benefit payments pending disposition on the merits of their claims. Formica immediately filed a notice of removal to federal court on the grounds that the complaint stated claims under ERISA for breach of fiduciary duty even though no such claim was alleged. Petitioners in turn amended their complaint naming the Plan as a party and adding a claim under ERISA for breach of fiduciary duty, including a claim under 29 U.S.C. 1132(a)(3). Petitioners again asked for appropriate equitable relief in the form of an injunction enjoining Formica and/or the Plan from reducing Petitioners monthly benefit payments and restoring the amount of those benefits to the *status quo ante*.

The District Court denied Petitioners' motion for injunctive relief. The District Court determined that Petitioners' state law claims were preempted by ERISA because their claim "relates to an ERISA benefit plan." At the same time the District Court found that Petitioners complaint stated a proper claim for breach of fiduciary duty

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[2] The record confirms that Formica had been aware of the miscalculations for as long 18 months, but purposefully chase to implement the reductions without notice so as to avoid any challenge prior to implementation.

under ERISA. (App. 20a). The District Court also acknowledged that Petitioners "are retirees who presumably are on a fixed income and that even a slight reduction in the monthly incomes can cause serious repercussions amounting to irreparable harm." (App. 20a) Nevertheless, the District Court held that the specific form of injunctive relief sought by Petitioners, e.g. the cessation of reductions in the monthly pension benefits and the restoration of the benefits to their full amounts before the cuts, does not constitute "appropriate equitable relief" under ERISA. According to the District Court, what Petitioners "really seek to recover is their reliance interest in the representations made to them by Formica."(App. 19a) The District Court reasoned that a claim of that nature boils down to nothing more than a claim for monetary or compensatory damages which is not authorized by ERISA.

Petitioners filed an interlocutory appeal from the District Court's order with the United States Court of Appeals for the Sixth Circuit. Petitioners' motion to expedite the appeal was granted; however, the court of appeals affirmed the District Court's decision denying Petitioner's motion for injunctive relief. The court of appeals agreed that Petitioners' state law claims were preempted by ERISA for the ostensible reasons that Petitioners' state law claims stemmed from the acts of Formica in the processing of the benefit payments and that the amount of Formica's potential liability is a function of how much the pension plan pays to each retiree. (App.7a) The court of appeals also concluded that Petitioners were asking the courts to direct Formica or the Plan "to pay monies, which are not owed, for an uncertain duration." (App. 9a) Accordingly, the court of appeals ruled that the relief sought by Petitioners is a claim for compensatory damages that is not available under ERISA. Because an appropriate equitable remedy restoring Petitioners' benefits to the promised amount

can be fashioned within the make whole provision of ERISA, this Petition for a Writ of Certiorari has been filed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Opportunity To Consider The Position Advanced By The United States As *Amicus* And Posited By Justice Ginsburg's Concurrence In *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), That Parties Subjected To A Breach Of Fiduciary Duty In Violation Of ERISA, Such As Petitioners Herein, Can Recover Some Form Of "Make Whole" Relief Under § 502(a)(3) of ERISA.

The central tenet of both lower court rulings in this case is that ERISA does not afford Petitioners a remedy for Formica's breach of fiduciary duty. Indeed, the district court reasoned that, "although Plaintiffs may have a meritorious claim under ERISA for breach of fiduciary duty . . . the Court is not able to say or predict what 'other appropriate equitable relief' Plaintiffs could be awarded in the event they do succeed . . ." (App. C at 20a). Correspondingly, the breadth of preemption under ERISA denies Petitioners the ability to pursue other remedies under state law. As a result, retirees such as Petitioners are left with no meaningful remedy for a clear breach of fiduciary duty.

This glaring incongruity in the law has prompted a "rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime. . . . As the array of lower court cases and opinions documents, fresh consideration of the availability of consequential damages under § 502(a)(3) is plainly in order." *Aetna Health Inc. v. Davila*, 542 U.S. 200, ___, 124 S.Ct. 2488, 2503

(Ginsburg, J., concurring) (citing *DeFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring); *Cicio v. Does*, 321 F.3d 83 (2d Cir. 2003); Langbein, "What ERISA Means by "Equitable": The Supreme Court's Train of Error in *Russell*, *Mertens*, and *Great-West*," 103 Colum.L.Rev. 1317, 1365 (2003)); *See also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 224 (2002) (Ginsburg, J., dissenting).

Despite an invitation by the United States as an *amicus*, this Court chose not to answer the "rising chorus" in *Aetna Health Inc. v. Davila* because the question was not properly before it:

> The United States, as *amicus*, suggests that some individuals in respondents' positions could possibly receive some form of "make-whole" relief under ERISA § 502(a)(3). However, after their respective District Courts denied their motions for remand, respondents had the opportunity to amend their complaints to bring expressly a claim under ERISA § 502(a)(3). Respondents declined to do so; the District Courts therefore dismissed their complaints with prejudice. Respondents have thus chosen not to pursue any ERISA claim, including any claim arising under ERISA § 502(a)(3). The scope of this provision, then, is not before us, and we do not address it.

124 S.Ct. at 2502 n. 7.

The issue not reached by the Court in *Davila* is squarely presented by this case.[3]

Petitioners amended their complaint following removal to specifically include a proper claim for breach of fiduciary duty under § 502(a)(3). Indeed, the district court specifically noted that Petitioners have made out a proper and potentially meritorious claim for breach of fiduciary duty for Formica's admitted negligence when it provided retirees with false, inaccurate and misleading information. (App. 20a). However, because the court could not conceive of any *remedy* for Petitioners' claim, it held that Petitioners were unlikely to succeed and denied any relief. (Id). Thus, if the law is as the United States suggested in its *amicus* brief in *Davila* (i.e., "make whole" relief is available under § 502(a)(3)), the outcome in this case would have been different.

In its brief in *Davila*, the United States made the same argument advanced by Petitioners before the district court and the court of appeals that the traditional law of trusts, under which a trustee may be compelled, in equity, to redress any breach of trust, has not been abrogated by ERISA:

> [T]he government has taken the position in several cases pending in the courts of appeals that Section 502(a)(3) allows at least some forms of "make-whole" relief against a breaching fiduciary in light of the general availability of such relief in equity at the time

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[3] *Davila* was decided four days after Petitioners' proof brief was filed with the Sixth Circuit. Petitioners raised this issue at length in their reply and cited to the United States' position during oral argument, but the Court of Appeals declined to even consider the possibility of more expansive relief under § 502(a)(3) or even cite *Davila*.

of the divided bench. See generally Sec'y of Labor Amicus Br. at 19-23, Mathews v. Chevron Corp., Nos. 02-15936 & 02-16209 (9th Cir. filed Nov. 25, 2002). Historically, a beneficiary's claim against a trustee for a breach of trust was typically remedied exclusively in the courts of equity because the beneficiary had only an equitable, not a legal interest, in the trust and its assets. See Restatement (Second) of the Law of Trusts § § 2 cmts. e and f, 197 (1959). A beneficiary therefore could maintain a suit in equity to obtain various forms of relief, including to compel the trustee to perform his duties as trustee, to enjoin the trustee from committing a breach, and "to compel the trustee to redress a breach of trust." Id. § 199(a)-(c). The trustee's liability in the event of a breach gave rise to various alternative remedies, including a remedy that "will put [the beneficiary] in the position in which he would have been if the trustee had not committed the breach of trust." Id. § 205 & cmt. a. A monetary recovery in those circumstances did not require a showing of unjust enrichment. See, e.g., id. § 205, cmt. c; *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000); see generally George G. Bogert & George T. Bogert, The Law of Trusts and Trustees 861, at 3-4 (rev. 2d ed. 1995). Neither *GreatWest* nor *Mertens* supports the proposition that Congress intended that the courts should ignore that settled trust-law understanding dating from the days of the divided bench. There is no occasion for the Court to address that issue here. Judicial acceptance of this position would, however, provide an effective remedy in many cases where the

> remedy under Section 502(a)(1)(B) may be inadequate.

Brief for the United States as Amicus Curiae, *Aetna Health, Inc. v. Davila*, S.Ct. Case Nos. 02-1845, 03-83, p. 27 n. 13, 2003 WL 23011479.

The position of the United States is entirely consistent with the plain language of ERISA § 502(a)(3), which specifically provides that a participant or beneficiary who suffers a breach of fiduciary duty may obtain "appropriate equitable relief" "to *redress* such violations." 29 U.S.C. 1132(a)(3)(B) (emphasis added). To rule as the district court and the court of appeals did in this case (i.e., that there is no remedy for Formica's breach of fiduciary duty), effectively reads the phrase "to redress such violations" out of the statute, rendering it meaningless. If the remedy provided by ERISA is to be completely exclusive, it must be meaningful and afford some form of "redress." This is what Congress intended when it enacted ERISA:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts. . . .

H.R. Rep. No. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871; *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) ("As part of the closely integrated regulatory system Congress included various safeguards to preclude abuse and

'to completely secure the rights and expectations brought into being by this landmark reform legislation.'"); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 145 (2d Cir. 1999) ("the creation of an adequate and, indeed, improved remedial scheme for the benefit of participants and beneficiaries was an important goal [of ERISA].").

Petitioners have brought a cognizable claim for breach of fiduciary duty against a plan fiduciary for providing false and misleading information to employees about benefits. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996). As the district court noted, "the unfortunate facts of this case largely appear to be undisputed." (App. C at 12a). Formica is clearly at fault for the misfortune that has befallen Petitioners – its gross negligence in providing inaccurate information about the amount of monthly benefits is displayed in undeniable, albeit euphemistic, terms in a letter from its counsel to the IRS. (App. D at 49a-73a). In the absence of Formica's negligence, many retirees would not have accepted early retirement. Now, a decade or more later, those benefits have been reduced, in some instances substantially. Formica's position, endorsed by the lower courts, is that there are no consequences to its admitted negligence. If such breaches of fiduciary duty are to be deterred, there must be consequences. Indeed, if ERISA or the fiduciary duty it purports to impose on retirement plans are to have any real meaning, the Act must be read to support a remedy for those harmed by a breach of fiduciary duty.

II. Review Is Appropriate Because The Courts Of Appeals Are In Disarray With Respect To The Scope Of Relief Available Under ERISA § 502(a)(3).

In a recent unreported decision addressing the availability of relief under § 502(a)(3) of ERISA, the Sixth Circuit Court of Appeals seemingly searched for a way to avoid confronting the scope of relief available under § 502(a)(3) – an issue it described as a "morass." *See Julia v. Bridgestone/Firestone, Inc.*, 2004 WL 1193961, **3, 101 Fed. Appx. 27, 32 Employee Benefits Cas. 3017 (6th Cir. 2004). The state of the law is a "morass" when it comes to the scope of available relief under ERISA § 502(a)(3). What constitutes "appropriate equitable relief," and whether meaningful "redress" can be afforded under ERISA, has been the subject of sharply divided Supreme Court opinions and an array of fractured and inconsistent lower court decisions.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Court held in a 5-4 decision that "appropriate equitable relief" includes injunctions enjoining fiduciary breaches and restitution for ill-gotten gains as a result of such breaches, but not common law damages. 508 U.S. at 262. *See also Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) (confirming availability of restitution as an equitable remedy). More recently in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), again in a sharply divided 5-4 decision, the Court differentiated between legal and equitable restitution claims, holding the former unavailable and the latter available under ERISA § 502(a)(3). 534 U.S. at 212-15. Subsequently, in *Aetna Health, Inc. v. Davila*, 534 U.S. 204, 124 S.Ct. 2488 (2002), the Court declined to reach the issue of whether "make-whole" relief was available as suggested by the United States.

Justice Ginsburg, joined by Justice Breyer, concurred in the judgment, but wrote "with greater enthusiasm" to encourage the Court and Congress to consider the issue of relief for ERISA violations. 124 S.Ct. at 2503.

Since the decision in *Davila*, at least two federal courts of appeals have rejected the "no remedy available" position adopted by the lower courts in this case and heeded Justice Ginsburg's call and remanded for consideration of possible remedies. *See Rubin-Schniederman v. Merit Behavioral Care Corp.*, 121 Fed. Appx. 414, 2005 WL 229862 (2nd Cir. 2005); *Schaffer v. Westinghouse Savannah River, Co.*, Slip Op. Case No. 04-1347, 2005 WL 567812 (5th Cir. 2005). However, the dearth of clear authority provides little meaningful guidance to these lower federal courts with respect to the scope of available relief. *See Griggs v. E.I. Dupont De Nemours & Co.*, 385 F.3d 440, 449-52 (4th Cir. 2004) (modifying district court's award of equitable relief described as "partial rescission" under which parties were restored to positions occupied prior to breach of fiduciary duty); *Downie v. Indep. Drivers Assoc. Pension Plan*, 934 F.2d 1168, 1170 (10th Cir. 1991) (approving district court's award of equitable relief designed to place parties in *status quo ante*, but remanding for clarification and to ensure that plan did not "come out ahead" as a result of award.").

Indeed, the existing authorities are in conflict. In *Strom v. Golman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999), the court of appeals permitted the widow of a plan participant to recover $500,000 in life insurance benefits that she would have received had the plan fiduciary not breached its duty by failing to process her husband's life insurance application in a timely manner. The court characterized this relief as equitable in nature and within the scope of ERISA § 502(a)(3). The Sixth Circuit, however, has rejected the

Second Circuit's position. *See Helfrich v. P.N.C. Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001). Similarly, in *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), a case in which the United States filed an *amicus* brief taking the position it noted in *Davila* in support of relief under ERISA § 502(a)(3), the court of appeals upheld a remedy fashioned by a district court under which plan documents were required to be modified so as to allow participants to receive monetary benefits to remedy a breach of fiduciary duty. The end result was that the plaintiffs received monetary payments in the form of benefits to which they were not contractually entitled under the original plan to redress a breach of fiduciary duty. In reaching this conclusion, the court analogized its ruling to the Court's holding in *Varity v. Howe*, 516 U.S. 489 (1996). *See Mathews*, 362 F.3d at 1186.

Despite the decisions noted above, other federal courts of appeals and district courts have rejected the position advanced by the United States in *Davila* and adopted in *Strom* and *Mathews*, and declined to undertake to fashion such remedies. *See Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 597-98 (8th Cir. 2005) ("We agree with the conclusion that *Great-West* 'appears to foreclose *Strom's* make whole remedial scheme.'"); *Crosby v. Bowater Inc. Retirement Plan*, 382 F.3d 587, 594-96 (6th Cir. 2004) (declining to consider how to fashion equitable relief to redress breach of fiduciary duty); *Goeres v. Charles Schwab & Co., Inc.*, 2004 WL 2203474 (N.D.Cal. 2004). Thus, there is a split among the circuits with respect to the scope of relief available under ERISA § 502(a)(3), and review is appropriate.

III. Review Is Appropriate Because The Breadth Of ERISA Preemption Has Been Overstated By The Courts Of Appeals To The Point Where Preemption Is Presumed Without Substantive Consideration Of The Nature Of Parties' Claims In Derogation Of The Court's Holdings.

Petitioners originally advanced only state law claims for negligent misrepresentation and promissory estoppel. With respect to these claims, Petitioners seek a remedy from their former employer, Formica Corporation, for its admitted negligence in providing inaccurate information when inducing them to accept early retirement. (App. 31a, 35a-36a). The remedy for this tort is sought from Formica Corporation, not the retirement plan. (Id.). The only tenuous connection with an ERISA regulated plan is the fact that the particular inaccurate information provided by Formica was the amount of Petitioners' monthly benefits under the plan. If the inaccurate information provided by Formica had been the amount of the early retirement incentive being offered by Formica or some other benefit provided by the Company to induce the employees to accept early retirement, there would be no question that ERISA preemption would not apply.

Throughout the course of these proceedings, Petitioners have consistently acknowledged that the case law is rife with pronouncements on the breadth of ERISA preemption. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987). However, to presume that a state law tort claim is preempted ignores the Supreme Court's clear directive under ERISA to start with the "presumption that Congress did not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (emphasis added). If the words "relate to any employee benefit plan" (29 U.S.C. § 1144(a)) were

"taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course." *Id.* at 655. Accordingly, this Court has held that federal courts must:

> go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Id. at 656. *See also California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997); *De Buono v. NYSA-ILA Med. & Clinical Services Fund*, 520 U.S. 806 (1997).

The breadth of ERISA preemption coupled with the erosion of meaningful remedies under ERISA has resulted in the conundrum described by Justice Ginsburg in *Great-West* which clearly frustrates the express purpose of ERISA to provide a broad and adequate remedial scheme. *See Great-West*, 534 U.S. at 224-29. A recent Ninth Circuit decision amply illustrates the unanticipated extent to which ERISA preemption has been carried and the incongruous results that are possible where the remedial scheme of ERISA is so narrowly circumscribed. In *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004), the court of appeals held that a group health insurer's state law contract claim against an insured employee for reimbursement was not preempted by ERISA. Dissenting from the court's denial of rehearing *en banc*, six judges of the court joined in an opinion decrying the incongruity of the current state of preemption law as applied by the Ninth Circuit:

> As a practical matter, the decision destroys a level playing field and creates the incongruous consequence

> that insurers may sue plan participants for reimbursement based on provisions in the insurance contract, but that plan participants cannot file suits or counter-claims, against insurers for breach of contract or bad faith in claims administration under the contract. Thus, insurers are now insulated from tort liability for even the most egregious act, while permitted to sue covered employees based on the same policy or plan. Such a result is incompatible with the theory and structure of ERISA . . . If we were considering ERISA preemption on a blank slate, our course might well have been different. If ERISA had been construed to allow plan participants to enforce their state common law and statutory rights outside the confines of ERISA remedies, the panel decision would be both logical and consistent. There are good arguments as to why the entire scope and nature of ERISA preemption ought to be reexamined. As Justice Ginsburg has observed "a series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief."

385 F.3d at 1176-77.

Under the Sixth Circuit's decision in this case, the authorities from the Sixth Circuit and numerous other courts, which have in the past allowed limited state law claims such as those advanced by Petitioners to proceed, are evidently no longer good law. *See Perry v. P.I.E. Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989) (holding that employees' claims for misrepresentation and promissory estoppel were not preempted); *Sandler v. New York News, Inc.*, 721 F.Supp. 506, 510-11 (S.D.N.Y. 1989) (finding no preemption of negligent misrepresentation claim where employer misstated

amount of monthly pension benefit in connection with early retirement discussions because Plaintiff "sues not as a participant seeking recovery of benefits from the Plan, but as an employee seeking economic damages from his employer alleged to arise from his relinquishment of his position . . ."); *McNamee v. Bethlehem Steel*, 692 F.Supp. 1477 (E.D.N.Y. 1988); *Padilla De Higginbotham v. Worth Publishers, Inc.*, 820 F.Supp. 48 (D. Puerto Rico 1993); *Pace v. Signal Technology Corp.*, 628 N.E.2d 20 (Mass. 1994); *Williams v. Cypert*, 708 F.Supp. 229 (W.D.Ark. 1989); *Greenblatt v. The Budd Co.*, 666 F. Supp. 735 (E.D.Pa. 1987).

The Supreme Court's latest discussion of ERISA preemption in *Aetna Health Care v. Davila*, contains more broad pronouncements on the breadth of preemption, but upon examination adds nothing of substance to the analysis in this case. The plaintiffs in *Davila* sued their HMO's under Texas law for failing to cover various treatments. 124 S.Ct. at 2497. Plaintiffs contended that the plans were required to provide coverage under a Texas statute, but the same Texas law under which the plaintiffs were suing provided that it did not create an obligation to provide treatment not covered by the plan. Thus, it was no great leap of logic for the Court to unanimously conclude that "interpretation of the terms of respondents' benefit plans forms an essential part of their [Texas law] claim." *Id.* at 2498.

Unlike *Davila*, Petitioners are not seeking benefits from the employee benefit plan in connection with their state law claims, and the determination of liability with respect to Petitioners' state law claims does not require interpretation of the plan nor will it affect the administration of the plan. Petitioners contend simply that they would not have retired had Formica exercised due care in connection with the provision of information to induce them to retire early. (App.

Ap. 35a, ¶ 41). The remedy for this tort is not an award of benefits from the plan as the plaintiffs sought in *Davila*, but an award of damages against Formica. To the extent pension benefits play any role in this matter it is for purposes of computing damages and offsets, and therefore not grounds for preemption as noted in *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 453 (6th Cir. 2003).

As Justice Ginsburg has noted, it is time to reevaluate both the scope of relief available under ERISA and the breadth of preemption to ensure that it is both a comprehensive and adequate remedial scheme as Congress intended. *See Davila*, 124 S.Ct. at 2503-2504. Inherent in the preemption doctrine is a balance between the federal interest in the policy advanced by the statute at issue and the state's interest in protecting its citizens. *See e.g. Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Preempting state law claims such as Petitioners' in this case only to have them denied any meaningful remedy under ERISA tilts this balance in the wrong direction.

CONCLUSION

This case presents an opportunity to directly address an undecided issue of law (i.e., the scope of relief available under ERISA § 502(a)(3)) on which the United States and the various courts of appeals are in disagreement. Review is appropriate to bring clarity and uniformity to the law and ensure that ERISA is applied consistent with Congressional intent to establish a broad and adequate remedial scheme.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed February 9, 2005]

No. 04-3464

BENJAMIN FRANK RAMSEY; WILLIAM BOYD; GERALD ECKEL; ELZIE HALSEY; LUCIAN JOHNSON; BRUCE MAYBRIAR, on behalf of themselves and all members of the putative class, Plaintiffs-Appellants,	)
FORMICA CORPORATION; SCOTT A. SMITH; EDWARD R. CASE;EARL M. BENNETT; FRANK A. RIDDICK, III, Defendants-Appellees.	)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati
No. 04-00149
Sandra S. Beckwith, Chief District Judge

Before: MARTIN and BATCHELDER, Circuit Judges; O'MEARA, District Judge.*

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The issue in this case is whether the temporary restraining order requested by plaintiffs is an authorized form of relief under the Employee Retirement Income Security Act. Plaintiffs and putative class members are former employees of Formica Corporation and participants in Formica's benefit pension plan who received overpayments of benefits each month for between eight and seventeen years. After an audit revealed the overpayments, Formica began issuing reduced payments to reflect a more accurate accounting. Plaintiffs brought this action alleging violation of state laws and the Employee Retirement Income Security Act. They also filed a motion, which is the subject of this appeal, for the court to restrain Formica temporarily from reducing their monthly benefit payments. The district court denied the motion, concluding that plaintiffs' state law claims are preempted by the Employee Retirement Income Security Act, and that plaintiffs' requested remedy, which the court found to be monetary damages rather than equitable relief, was not authorized by the Act. Our decision in this case depends entirely on whether we agree with the district court's conclusion that the requested relief is legal, not equitable, and therefore is not authorized by the Act.

---

* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

A 2003 audit of Formica's pension plan found that 440 of the 624 retirees in its defined pension plan dating from 1985 were receiving incorrect benefits. In January of 2004, Formica, which is emerging from Chapter 11 bankruptcy reorganization, found that 295 retirees received overpayments totaling about $1 million and another 145 retirees had been underpaid a total of about $500,000. Formica entered into a Voluntary Compliance Program with the Internal Revenue Service and began correcting the benefit payment mistakes.

While Formica made up the underpaid amounts, it also reduced the payments of those who were overpaid, and it has indicated that it may have to recover the overpayments. Although Formica is still working on a strategy in an administrative process to resolve the pension plan errors, the company went ahead and paid reduced monthly benefits to the overpaid retirees, beginning in January of 2004. Plaintiffs, who average seventy years of age, are six retirees and putative class members who were overpaid. Plaintiffs' monthly payments were reduced, depending on the individual, by as little as a few cents or as much as $150.

Plaintiffs bought into Formica's retirement plan as a result of Formica's early retirement solicitations. At various times since 1985, Formica solicited substantial groups of employees to take early retirement and presented each employee with proposed early retirement kits. The kits included pre-prepared documents describing the incentive for early retirement as well as individualized estimates detailing what the specific retiree could expect in benefits each month. Based on these documents, plaintiffs chose to retire early. For between eight and seventeen years, depending on the individual, plaintiffs

received monthly benefit checks in the amounts that were represented to them by Formica's early retirement solicitation.

To maintain their monthly payments notwithstanding the audit findings, plaintiffs filed an action in state court alleging claims of negligent misrepresentation and promissory estoppel. Contemporaneously, plaintiffs filed a motion for a temporary restraining order to enjoin Formica from reducing its monthly benefit payments. The same day, Formica filed a notice of removal, arguing that plaintiffs' complaint stated claims under the Employee Retirement Income Security Act for breach of fiduciary duty. The district court accepted jurisdiction pursuant to 29 U.S.C. § 1132(a)(3), and held a conference that afternoon to establish a briefing schedule and a hearing date for oral argument with regard to plaintiffs' motion for a temporary restraining order. The next day, Formica amended its notice of removal to argue that plaintiffs seek "to recover pension benefits" and, therefore, that plaintiffs' state law claims are entirely preempted by the Act. Plaintiffs then amended their complaint to add claims for breach of fiduciary duty and equitable relief under the Act and to name as additional defendants the fiduciaries of Formica's Employee Retirement Plan.

As was made clear through expedited discovery and oral argument, plaintiffs asked the court to maintain the status quo by prohibiting the issuance of reduced monthly benefit checks during the pendency of the administrative process in which Formica is currently working out a strategy to correct its errors. When questioned by the district court at oral argument regarding how the former payments could continue to be made, given the understanding by all parties that the pension plan was under no obligation to continue to disburse overpayments of retirement benefits, plaintiffs suggested that Formica, rather than the pension plan, could make up the

difference between the amount that the pension plan owed and the amount that Formica represented each plaintiff would receive. The district court found that plaintiffs' state law claims were entirely preempted by the Employee Retirement Income Security Act, and the type of relief that plaintiffs sought was not available under the Act. Therefore, the court denied the motion for a temporary restraining order.

We now consider whether plaintiffs' substantive claims are preempted by the Employee Retirement Income Security Act, and, if so, whether the Act provides the requested relief.

II.

We review a district court's denial of a preliminary injunction for abuse of discretion. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996). We will hold that the district court erred only if it incorrectly applied the law, or relied on clearly erroneous findings of fact. *Id.* (citing *Christian Schmidt Brewing Co. v. G. Heilman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985)). Thus, we review the district court's conclusions of law de novo and its findings of fact for clear error. *Golden*, 73 F.3d at 653 (citing *Performance Unlimited v. Questar Publishers Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995)). Questions of preemption and available relief under the Employee Retirement Income Security Act are questions of law subject to de novo review. *See Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989) (holding that when the trial court applies statutory law to the facts, the holding becomes a conclusion of law reversible under the de novo standard).

III.

A. Employee Retirement Income Security Act Preemption

The first question is whether plaintiffs' claims are preempted by the Employee Retirement Income Security Act. The relevant preemption clause states that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to an employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has interpreted this clause to preempt state law claims that would allow employee benefit plan beneficiaries to "obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987). Such an interpretation is necessary, according to the Court, to give effect to Congress's intent "that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits." *Id.* at 52. We have recognized the broad sweep of the Act's preemption provision in relation to state law claims based upon an improper denial of benefits, noting that "virtually all state law claims relating to an employee benefit plan are preempted by ERISA." *Cromwell v. Equicor-Equitable HCA Corp.,* 944 F.2d 1272, 1276 (6th Cir. 1991).

The parties concede that Formica's pension plan is governed by the Act. Thus, to determine whether plaintiffs' state law claims are preempted, we must determine whether the claims "relate to" Formica's pension plan. To do that, we consider the kind of relief that plaintiffs' seek, and its relation to the pension plan.

Plaintiffs claim that "[n]othing about this claim or the remedy sought impacts, or in any way effects [sic], an employee benefit plan[,] for the claim lies solely against

Formica for the value of forgone employment." Plaintiffs emphasize that because they would be satisfied with payment of the overpayment/reduced payment differential from Formica, rather than the pension plan, then the Act is not implicated and preemption is unwarranted. Plaintiffs' argument is made clear by the following exchange:

> THE COURT: Okay. Correct me if I'm wrong. What I'm hearing from you is what your people want is status quo ante, before there was a cut in the checks, and you don't really care where that difference comes from, whether it is out of the pension plan's pot of money or the corporation chips in—
>
> [COUNSEL]: No.
>
> THE COURT: —pending the administrative resolution.
>
> [COUNSEL]: That's true, we don't care where it comes from. We care how much money they have in their pockets at the end of the month. That's what we care about.

Even so, it is clear that all of plaintiffs' state law claims stem from the actions of Formica in the processing of their benefit payments. Furthermore, the amount that Formica would owe, assuming relief is granted, is a function of how much the pension plan pays to each plaintiff. It is also well-established that such state law tort claims are preempted by the Act. *See Pilot Life Ins. Co.*, 481 U.S. at 57 (state law bad-faith claim preempted); *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 942 (6th Cir. 1995) (finding state-law claims for wrongful death, improper denial of benefits, medical

malpractice, and insurance bad faith were preempted because defendants "were determining what benefits were available to [plaintiff] under the plan"); *Cromwell,* 944 F.2d at 1276 (holding state-law claims of promissory estoppel, breach of contract, negligent misrepresentation, and breach of good faith based on denial of benefits "are at the very heart of issues within the scope of ERISA's exclusive regulation"). Thus, plaintiffs' state law claims necessarily relate to Formica's pension plan. The district court correctly found that the claims are preempted.

B. Availability of Requested Relief

Upon affirming the district court's finding of preemption, we now consider plaintiffs' request for a temporary restraining order in light of the Employee Retirement Income Security Act. As discussed below, we conclude that the requested relief is not available under the Act and, therefore, the district court properly denied the motion.

Plaintiffs seek injunctive relief under 29 U.S.C. § 1132(a)(3), which provides:

> A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The Supreme Court has construed the phrase "appropriate equitable relief" narrowly, noting that such equitable relief is limited to redressing violations or enforcing provisions of the Act or a plan governed by the Act. *Mertens v. Hewitt Assocs.,*

508 U.S. 248, 253-54 (1993). The Court has eschewed a compensatory monetary award as an available remedy and held that the equitable relief referenced in the Act is limited to those "categories of relief that were typically available in equity." *Id.* at 256. The Act does not provide a cause of action for legal actions for monetary damages disguised as suits in equity. *Great-West Life,* 534 U.S. at 215-16.

Here, plaintiffs request a restraining order; ordinarily, this is a form of equitable relief. However, plaintiffs asks the Court to direct Formica, or its pension plan, to pay monies, which are not owed, for an uncertain duration. As Formica argues, this is "the kind of dollar amount that doesn't lend itself to injunctive relief. It lends itself appropriately for claims of relief if you prevail." This form of relief is not authorized under the Act. Therefore, the district court correctly denied plaintiffs' motion.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed February 9, 2005]

No. 04-3464

BENJAMIN FRANK RAMSEY; WILLIAM BOYD; GERALD ECKEL; ELZIE HALSEY; LUCIAN JOHNSON; BRUCE MAYBRIAR, on behalf of themselves and all members of the putative class, Plaintiffs-Appellants,	)
FORMICA CORPORATION; SCOTT A. SMITH; EDWARD R. CASE;EARL M. BENNETT; FRANK A. RIDDICK, III, Defendants-Appellees.	)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati
No. 04-00149
Sandra S. Beckwith, Chief District Judge

Before: MARTIN and BATCHELDER, Circuit Judges; O'MEARA, District Judge.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRM ED.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 1:04-CV-149

[Filed April 6, 2004]

Benjamin Frank Ramsey, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
Formica Corporation, et al.,	)
Defendants.	)
	)

ORDER

This matter is before the Court on Plaintiffs' motion for a temporary restraining order (Doc. No. 2). For the reasons set forth below, Plaintiffs' motion is not well-taken and is **DENIED.**

I. Background

Even at this early stage of the proceedings, the unfortunate facts of this case largely appear to be undisputed.

Plaintiffs, and the putative class they represent, are former employees of Formica Corporation ("Formica") and participants in the Formica Corporation defined benefit pension plan. At various times, ranging as far back as 1986, Formica Corporation offered Plaintiffs and the putative class members an early retirement buyout. Included in the materials Formica distributed to offerees of the buyout to assist their decisionmaking was an estimate of the monthly benefit they would receive from the pension plan. Although there were other incentives included in the buyout, Plaintiffs allege that they relied on Formica's representation regarding their monthly pension benefit in deciding to accept early retirement.

In any event, Plaintiffs retired from Formica and began receiving monthly pension payments corresponding to the estimates provided by Formica. Plaintiffs in fact received the monthly estimated pension payments for years and years, for as long as seventeen years in the case of one Plaintiff. For reasons not disclosed on the record at this time, in 2002, Formica engaged the firm of Mercer Human Resources Consulting ("Mercer") to audit the pension plan. Mercer's audit revealed that, for reasons not important here, Formica had miscalculated the monthly benefit due to a substantial segment of the plan's participants. Due to its error, Formica had been underpaying approximately 170 pensioners. More egregiously, at least in the eyes of the Plaintiffs, Formica had been overpaying nearly 300 pensioners, including the Plaintiffs and the putative class members. In other words, Formica had not been complying with the requirements of the pension plan with regard to the monthly benefits payable to the retirees.

Formica disclosed its actuarial errors to the Internal Revenue Service pursuant to the Voluntary Compliance Plan

("the VCP") in Revenue Procedure 2002-47. One of the benefits of voluntary reporting is that the employer can possibly avoid the drastic consequences of the IRS finding out on its own that the plan is not in compliance, such as plan disqualification and/or the imposition of substantial fines or penalties. One of the requirements of the VCP, however, is that the plan sponsor must adjust the pensioners' payments to the amount called for by the plan. In the case of Formica's plan, it meant that pensioners who were being underpaid had to have their benefits adjusted upwardly. It also meant that the Plaintiffs and the putative class members would have to have their monthly pension payments adjusted downwardly. And, as if that development were not bad enough, there remains the possibility that Formica may be required to recoup, or at least attempt to recoup, the amounts it has been overpaying Plaintiffs and the putative class members all of these years.

In January, in accordance with its VCP submission to the IRS, Formica notified Plaintiffs and the class members that effective with the January payment, it was reducing their pension payments by the amount indicated on their individual notices. In some cases, the monthly reduction in benefits is substantial. Plaintiffs, understandably upset about the sudden and unexpected loss of income, filed suit against Formica in the Hamilton County Court of Common Pleas. Plaintiffs' complaint against Formica asserted only state law claims for negligent misrepresentation and promissory estoppel. In addition to claims for other forms of compensatory damages, Plaintiffs also sought injunctive relief compelling Formica to restore their monthly payments to the pre-notice levels. Plaintiffs' complaint also includes allegations for a class of pensioners who have had their monthly pension payments reduced as well.

On February 20, 2004, Formica removed Plaintiffs' complaint from state court on the grounds that their claims for negligent misrepresentation and promissory estoppel are completely preempted by ERISA, 29 U.S.C. § 1001, *et seq.* Plaintiffs then filed an Amended Complaint which added two ERISA claims for breach of fiduciary duty and one ERISA claim for equitable relief. The Amended Complaint also added the individual plan administrators as parties. Despite filing an amended complaint adding federal ERISA claims, Plaintiffs still seek a temporary restraining order compelling Formica to restore their monthly payment to the amount Formica represented to them at the time they accepted the early retirement buyout.

II. Injunctive Relief Standard of Review

In order to obtain a temporary restraining order, the trial court must consider and weigh the following factors: 1) the plaintiff's likelihood of success on the merits; 2) whether plaintiff will be irreparably harmed in the absence of an injunction; 3) the harm to others if an injunction is granted; and 4) the public's interest in granting an injunction. *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997). These factors are not prerequisites to issuing an injunction but factors to be balanced. *See Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean*, 755 F.2d 1223, 1229 (6th Cir. 1985). The Court should not issue an injunction where there is no likelihood of success on the merits. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997).

III. Analysis

A. Likelihood of Success on the Merits

The difficulty for Plaintiffs under this part of the analysis is not that they do not have any claims which might merit relief. Rather, the problem is, as will be seen, that the type of relief to which Plaintiffs may be entitled is very limited and, unfortunately for them, does not include recovery of what amounts to compensatory damages. In other words, even assuming that each and every allegation of the complaint is true, the Court is not authorized to grant Plaintiffs the injunctive relief they seek here.

Initially, the Court is compelled to agree with Formica that Plaintiffs' state law claims for negligent misrepresentation and promissory estoppel are completely preempted by ERISA because they claims relate to an ERISA benefit plan. *See Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 794-95 (1st Cir. 1995); *Griggs v. E.I. Dupont De Nemours & Co.*, 237 F.3d 371, 378 (4th Cir. 2001); *Wilcott v. Matlack, Inc.*, 64 F.3d 1458, 1464 (10th Cir. 1995); *Warren v. Blue Cross & Blue Shield of SC*, No. 97-1374, 1997 WL 701413 (4th Cir. Nov. 12, 1997); *Farr v. U.S. West Comm., Inc.*, 151 F.3d 908 (9th Cir. 1998). Thus, the Court cannot grant Plaintiffs relief of any kind pursuant to state law causes of action. Consequently, Plaintiffs only resort is the remedies available to them under ERISA.

Although the amended complaint can be read to include a claim for equitable estoppel under ERISA, the Sixth Circuit has not yet recognized an ERISA equitable estoppel claim in defined benefit pension plans and dicta strongly suggests that because of actuarial concerns, it should not be applied in cases involving pension plans. *Armistead v. Vernitron Corp.*, 944

F.2d 1287, 1299-1300 (6th Cir. 1991); *see also Bielkie v. General Motors Corp.*, No. 98-1873, 1999 WL 644336, at **2 (6th Cir. Aug. 19, 1999) ("*Sprague* did recognize the viability of estoppel claims, but its holding is limited to welfare plans."). In any event, equitable estoppel only applies where the plan term is ambiguous and Plaintiffs do not contend that the terms regarding the benefits they should have received is ambiguous. Similarly, there is no common law ERISA claim for negligent misrepresentation. *Local 6-0682, Internat'l Paper Union v. National Ind. Group Pension Plan*, 342 F.3d 606, 606 (6th Cir. 2003).

Although Plaintiffs couch their claim for relief as payment of the benefits they were promised, what they really seek to recover is their reliance interest in the representations made to them by Formica. Section 1132(a) (1) (B) of ERISA allows a participant or beneficiary to sue "to recover benefits due him under the terms of the plan." Plaintiffs, however, are not suing to recover benefits under the terms of the plan. Under the terms of the plan, they are due less benefits, not more, and Plaintiffs do not appear to contest the fact that the actual terms of the plan require them to be paid less. Therefore, Plaintiffs do not have a claim under this particular clause of § 1132(a) (1) (B).

Section 1132(a) (1) (B) also permits participants and beneficiaries to sue to enforce their rights under the plan. Plaintiffs, however, do not have a right to more benefits under the terms of the plan. Therefore, Plaintiffs do not have a claim under this clause of § 1132(a) (1) (B). Finally, Plaintiffs are not suing to clarify their rights to future benefits under the terms of the plan. Indeed, they appear to concede, or at least accept, that the downward adjustments in their pensions are called for by the terms of the plan. Therefore,

Plaintiffs do not have a claim under this clause of § 1132(a) (1) (B).

Plaintiffs' amended complaint does include ERISA claims for breach of fiduciary duty. Plaintiffs do not, however, claim that Formica has breached its fiduciary duty by adjusting their payments to what they should have been or what they should be under the terms of the plan. Rather, Plaintiffs claim that Formica breached its fiduciary duty by misrepresenting what their monthly pensions would be, thereby inducing them to accept the early retirement buyout.

Section 1132(a) (2) of ERISA permits a participant or beneficiary to sue for breach of fiduciary duty. However, relief under § 1132(a) (2) is available only to the plan and not to individual participants and fiduciaries. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985); *Bagsby v. Central States, Southeast & Southwest Areas Pension Fund*, 162 F.3d 424, 430 (6th Cir. 1998). Therefore, the Court cannot grant the relief to the Plaintiffs as individual participants and beneficiaries pursuant to § 1132(a) (2).

Therefore, it appears that the only potential avenue of relief remaining to Plaintiffs is a suit for breach of fiduciary duty pursuant to § 1132(a) (3), which allows participants to sue "for other appropriate equitable relief." *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Because Plaintiffs have no other avenue for relief and are not recasting a denial of benefits claim as a breach of fiduciary duty claim, *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615-16 (6th Cir. 1998), does not bar a claim for relief pursuant to *Varity*. Beneficiaries and participants have a private right of action for breach of fiduciary duty pursuant to § 1132(a) (3) . *Allinder v. Inter-City Products Corp.*, 152 F.3d 544, 551 (6th Cir. 1998). Plan participants or plan beneficiaries may assert

claims for breach of fiduciary duty where plan fiduciaries make materially misleading misrepresentations, whether negligently or intentionally, regarding the extent or availability of plan benefits. *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992).

However, under § 1132(a) (3), only "appropriate equitable relief" is available, which means only those categories of relief traditionally available in equity. *Great West Life & Annuity Co. v. Knudson*, 534 U.S. 204 (2002) . Money damages or compensatory damages, and punitive damages are not available under § 1132(a) (3). *Id.*; *Community Ins. Co. v. Morgan*, 54 Fed. Appx. 828, 832 (6th Cir. 2002); *Allinder*, 152 F.3d at 552; *Local 6-0682*, 342 F.3d at 609 n.2. Injunctive relief is equitable in nature, *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993), and, although Plaintiffs do seek an injunction, what they really want is to continue to be paid the monthly amount they were promised. In other words, Plaintiffs seek to recover their reliance interest in Formica's representations about their monthly benefits. Therefore, although at this point the claim for relief is couched in terms of injunctive relief, the ultimate relief sought by Plaintiffs is really money damages. Thus, Plaintiffs' claim for injunctive relief, as it now stands, is barred pursuant to the authorities just cited.

Finally, the Court notes that restitution is a form of money damages which is equitable in nature. However, restitution is limited to the return of identifiable funds or property belonging to the plaintiff and in possession of the defendant. *Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 583-84 (6th Cir. 2001). In this case, Defendants are not in possession of

any funds which rightfully belong to the Plaintiffs. Therefore, restitution is not an available form of relief to Plaintiffs either. The upshot here is that although Plaintiffs may have a meritorious claim under ERISA for breach of fiduciary duty, under the current state of the law they are only entitled to "other appropriate equitable relief." The Court is not able to say or predict what "other appropriate equitable relief" Plaintiffs could be awarded in the event they do succeed on their claim for breach of fiduciary duty, but is clear that they would not be entitled to recover what amounts to payment of compensatory damages. Therefore, because money damages are not an available form of relief, under the circumstances presented by Plaintiffs' motion, the limited relief that is available is tantamount to or the equivalent of no likelihood of success on the merits.

B. Irreparable Harm

The Court recognizes that Plaintiffs and the potential class members are retirees who presumably are on fixed incomes and that even a slight reduction in their monthly incomes can cause serious repercussions amounting to irreparable harm. *See, e.g., Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996). Nonetheless, as noted above, the Court cannot grant injunctive relief where there is no likelihood of success on the merits. The Court has already found that there is no likelihood that Plaintiffs are entitled to recovery of compensatory damages. Thus, unfortunately, the irreparable harm factor essentially drops from the Court's analysis.

C. Harm to Others

In this particular case, to the extent that it affects the plan's actuarial assumptions or valuations and qualified status,

granting injunctive relief could be harmful to the other plan participants who would not be members of the proposed class.

D. The Public's Interest

While the public would undoubtedly be sympathetic to Plaintiffs' predicament, in ERISA cases, the presumption is that if a specific remedy is not expressly authorized in the statutory scheme, then Congress did not intend for participants to have that remedy. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Because ERISA does not authorize recovery of compensatory damages in this particular case, the Court believes that the public interest would weigh in favor of adhering to ERISA's enforcement scheme and against granting the injunctive relief requested by Plaintiffs.

Conclusion

Because ERISA does not authorize an award of compensatory damages under the circumstances of this case, Plaintiffs have no likelihood of success on their petition for injunctive relief. As a consequence of that finding, the remaining factors of necessity weigh against Plaintiffs as well. According, Plaintiffs' motion for a temporary restraining order is not well-taken and is **DENIED**.

IT IS SO ORDERED

Date April 6, 2004 /s/_____

Sandra S. Beckwith
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 1:04-CV-149

Benjamin Frank Ramsey, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
Formica Corporation, et al.,	)
Defendants.	)
	)

PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND

Now come Plaintiffs, Benjamin Frank Ramsey, William Boyd, Gerald Eckel, Elzie Halsey, Lucian Johnson and Bruce Maybriar, on behalf of themselves and others similarly situated who for their class action complaint against Formica Corporation and Formica Corporation Employee Retirement Plan, state as follows:

I. INTRODUCTION

1. This is a class action lawsuit brought by Plaintiffs on behalf of themselves and other similarly situated (the

"putative class"), too numerous to list individually, who retired from Formica Corporation at various times from 1986 through 1996 by accepting early retirement incentive packages. As an incentive to induce Plaintiffs to retire early, Formica promised to pay them supplemental monthly "bridge" payments from the date of their retirement until they became eligible for social security benefits in addition to benefits available under Formica's defined benefit pension plan. In connection with the presentation of this incentive, Formica provided each employee with a statement of the amount of his or her monthly pension benefit under Formica's defined benefit plan based upon age and years of service. Between 1986 and 1996 approximately 300 or more Formica employees accepted early retirement in this fashion. These employees executed releases in favor of Formica and resigned their employment foregoing the right and opportunity to receive future wages and associated employee benefits. Formica paid the promised "bridge" payments, and Plaintiffs received monthly pension benefits in the amount indicated by Formica at the time of their retirement until January 2004 when Formica announced that it had miscalculated the amount of retiree pension benefits resulting in overpayments to members of the putative class. Members of the putative class have been advised that effective immediately their monthly pension benefits have been reduced to correct Formica's miscalculation and that Formica is determining whether and how to recoup overpayments made from as long ago as 1986 to the present as a result of Formica's error.

2. Plaintiffs initially brought this action in Hamilton County Court of Common Pleas asserting solely state common law claims of negligent misrepresentation and promissory estoppel against Formica Corporation. Formica Corporation removed the action to this court alleging that Plaintiffs' claims or defenses thereto raised federal questions

under the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1101, *et seq*; with respect to the administration of pension plans covered by ERISA. In furtherance of this assertion, counsel for Defendant Formica Corporation suggested to the Court on February 20, 2004 that the misrepresentations by Formica to employees considering early retirement could have been in Formica's capacity as a fiduciary of the Formica Corporation Employee Retirement Plan, ("the Plan"). (Transcript pp. 36-37). Accordingly, solely as an alternative to Plaintiff's state law theories, Plaintiffs are amending this complaint to state claims for relief under ERISA (29 U.S.C. § 1101, *et seq)* including without limitation 29 U.S.C. § 1132(a)(3)(B) for equitable relief against Formica Corporation and the fiduciaries and all administrators of the Formica Corporation Employee Retirement Plan, namely the individual members of the Formica Corporation Benefit Plans Committee.

3. Plaintiffs seek an award of all damages stemming from their decision to relinquish their employment with the company thereby giving up seniority rights, future wages, salaries, and employee benefits such as health, disability and life insurance, their decision to waive their rights against the company, including without limitation their rights under the ADEA, and their decision to retire early and thereby accept lower levels of social security benefits and forego the opportunity to earn increased pension benefits, which decisions were made based upon information provided by Formica in order to induce Plaintiffs to retire early. Plaintiffs allege that in seeking to induce Plaintiffs to make the very significant decision to retire early, Formica had a duty to provide accurate information in connection with that decision and that it was foreseeable that Plaintiffs would rely upon the information provided. Plaintiffs further allege that Formica was reckless and/or negligent with respect to the information

it provided to the individuals it sought to induce to retire early thereby breaching Formica's duty to exercise due care in the provision of such information, which breach is now resulting in a great detriment to Plaintiffs. Accordingly, Plaintiffs seek a remedy designed to restore them to the position they would occupy had they not been misinformed by Formica, in which case Plaintiffs would not have accepted Formica's early retirement proposal, including monetary damages and equitable relief. Alternatively, Plaintiffs seek appropriate relief under ERISA for Formica Corporation's and/or the Plan Administrators' breach(es) of fiduciary duty.

II. JURISDICTION AND VENUE

4. If, as Defendant Formica Corporation contends, that Formica Corporation was acting as a fiduciary of the Plan when it misrepresented the amount of pension benefits to potential retirees, this Court has original federal jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1101 *et seq* and specifically 29 U.S.C. §1132 (a)(3)(B) which provides for appropriate equitable relief to redress violations of ERISA or to enforce provisions of the Act or terms of a covered plan. This Court may also assume supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Plaintiffs' state law claims which derive from the same nucleus of operative fact as the federal claims.

5. Venue is appropriate in this Court because the acts and omissions complained of and sought to be preliminarily and permanently enjoined occurred or are about to occur in this judicial district.

III. PARTIES

6. Plaintiff, Benjamin Frank Ramsey, is a citizen of the United States and a resident of Hamilton County, Ohio. Mr. Ramsey is a former employee at Formica who retired from the company in 1986.

7. Plaintiff, Gerald Eckles, is a citizen of the United States and a resident of Hamilton County, Ohio. Mr. Eckles is a former employee at Formica who retired from the company in 1996.

8. Plaintiff, William Boyd, is a citizen of the United States and a resident of Hamilton County, Ohio. Mr. Boyd is a former employee at Formica who retired from the company in 1995.

9. Plaintiff, Elzie Halsey, is a citizen of the United States and a resident of Hamilton County, Ohio. Ms. Halsey is a former employee at Formica who retired from the company in 1996.

10. Plaintiff, Bruce Maybriar, is a citizen of the United States and a resident of Hamilton County, Ohio. Mr. Maybriar is a former employee at Formica who retired from the company in 1996.

11. Defendant, Formica Corporation, is a for-profit corporation registered to do business in the state of Ohio which manufactures counter-tops and other surfacing materials. Formica owns, operates and maintains a manufacturing facility in Evendale, Hamilton County, Ohio.

12. Defendant, Formica Corporation Benefit Plan Committee ("the Committee") and its individual members,

Scott A. Smith, Edward R. Case, Earl M. Bennett and Frank A. Riddick, III (The "Plan Administrators") is and are the administrator(s) of the Formica Corporation Employee Retirement Plan, ("the Plan"), a qualified retirement pension plan sponsored by Formica Corporation which was formed and is administered under the provisions of the ERISA 29 U.S.C. § 1101 *et seq.* Formica is the sponsor of the Plan which is administered by Formica employees acting in fiduciary capacities with respect to the Plan.

IV. STATEMENT OF THE CASE

13. Beginning in 1986 and on several occasions thereafter, e.g. 1991, 1994, and 1996, and perhaps others, Formica determined to take measures to reduce its workforce at its Evendale facility.

14. As a means to accomplish its goal of reducing its workforce, Formica offered voluntary retirement incentive packages to various categories of employees. Eligibility for participation in the various package(s) was determined by a formula which combined the employee's age and his or her years of service with the company. As a result of this formula, only Formica's older and more senior employees were eligible.

15. In order to induce employees to accept these early voluntary retirement packages and to leave their employment, Formica "sweetened" the proposed retirement package by including financial incentives such as signing bonuses or "bridge" payments over and above the specified monthly retirement benefit available under The Plan until each retiree reached an age at which he or she became eligible to receive social security payments.

16. In connection with the presentation of early retirement incentives, Formica provided each employee to whom such a package was available with an individualized calculation of the amount of monthly pension benefits available to the employee under Formica's defined benefit plan if he or she retired at the time the early retirement incentive was being offered. It was also Formica's practice to represent to each employee being offered an early retirement incentive or regular retirement how much his or her monthly pension benefit would be if retirement was delayed until age 62.

17. Considering the significance of the decision to retire, it was reasonably foreseeable that employees would rely upon the information provided by Formica in deciding whether to accept the early retirement package or continue their employment.

18. Formica had a duty to exercise reasonable care in providing information to be relied upon by employees considering either the company's early retirement proposal or the amount of regular retirement benefits.

19. Each employee who accepted a voluntary early retirement incentive package was required to review the package personally, and where appropriate, with his or her affected spouse, and to consider the value and merit of the package over the time period prescribed by federal law. In consideration for and as a pre-condition to accepting the voluntary retirement incentive package each participating employee was required to execute a release by which the employee agreed to waive any potential claims against Formica for violations of their rights, including without limitation claims arising under the ADEA, and to permanently relinquish his or her employment with the company. A sample

copy of the release executed by Plaintiffs is attached hereto as Exhibit A.

20. Between 1986 and 1996, an estimated 300 or more employees at Formica's Evendale facility accepted the company's early retirement incentive packages. Retirees received the promised "bridge" payments until each individual became eligible to collect social security. In addition, upon retirement, the retirees received monthly pension benefits in the amounts represented by Formica until the present time.

21. In or about January, 2004, many retirees who elected to accept early retirement incentive packages as well as some retirees who qualified for regular retirement were notified by Formica that their monthly retirement benefits would be reduced. According to the notice prepared by Formica and sent to the retirees, alleged miscalculations occurred in the computation of the monthly retirement benefits which had resulted in months and even years of over-payments in varying amounts to the retirees. Formica informed these retirees that effective immediately their monthly checks would be reduced by a certain amount to adjust for the miscalculation(s), and these retirees further understand that the company is considering further action to recoup what it contends were improper overpayments received by the retirees. The recalculated pension benefits will in many cases be substantially less than the amount Formica represented to the retiree when presenting the early retirement incentive package. A sample copy of one such letter is attached as Exhibit B.

22. The notices sent by Formica advised the affected retirees that if they disagreed with the company's recalculations they could avail themselves of an administrative

process to register their objections. The process is a multi-step process which spans approximately 7-9 months or more to complete. While an appeal pends, however, the retirees will receive only their re-calculated or reduced monthly payment benefit.

23. The decisions of the putative class to accept early retirement incentive packages or to elect regular retirement were made only after and specifically because they were advised by Formica as to the individual amounts of their monthly retirement benefit for the balance of their lives following the relinquishment of their employment. Formica not only anticipated but knew that the employees would not retire early or elect to accept the regular retirement unless they had confidence in the receipt of a specified pre-determined monthly retirement benefit.

24. Plaintiffs substantially altered their economic positions based upon the information provided by Formica when it presented its early retirement incentive package. Plaintiffs agreed to waive their legal rights to bring potential claims against Formica and permanently relinquish their employment with the company along with their salaries and attendant employee benefits.

25. Alternatively, Formica and the members of the Committee failed to fulfill their fiduciary duty with respect to the Plan, including without limitation failing to use due care in the calculation of employee benefits, by failing to act upon receipt of notice of such errors to the detriment of plan beneficiaries, and by committing other acts and omissions that caused and contributed to the Plaintiffs' reliance upon inaccurate information when deciding whether to retire thereby causing Plaintiffs' damages.

26. As reflected in the notice to the Plaintiffs and the putative class notifying them of the reductions in their monthly pension benefits (Exhibit B), regardless of whether intentional or negligent, Formica's representations regarding the amount of the monthly pension benefits to be received by Plaintiffs prior to their retirement were false and untrue. Formica breached its duty of reasonable care when it provided Plaintiffs with inaccurate information in the course of inducing them to accept early retirement incentive packages and to elect regular retirement. Formica has publicly acknowledged and admitted its negligence in computing the amounts of retiree benefits between 1985 and 1998 in a submission to the IRS. (Ex. C).

27. As a direct and proximate result of their reasonable and foreseeable reliance upon the false representations of Formica, Plaintiffs and the putative class have been severely damaged by relinquishing their employment with Formica earlier than they otherwise would have chosen thereby foregoing the opportunity to earn and enjoy wages and salaries, employee benefits, and increased pension benefits as a result of continued employment.

28. Defendant Formica was acting as Plaintiff's employer when it acted negligently by providing inaccurate information when inducing them to retire. Accordingly, Plaintiffs' damages will be determined in accordance with Ohio tort law, which seeks to make the victims of torts such as Plaintiffs whole. Such damages will be computed by comparing the economic situation of the class presently with the economic situation the class would have occupied had Formica not breached its duty of care by providing erroneous information when inducing employees to accept early retirement. The decision of Plaintiffs and members of the putative class to take voluntary early retirement or to elect regular retirement were

made with the understanding that this decision would have lifelong consequences to them that would affect their economic and personal well-being. In these circumstances and until such time as Plaintiffs' damages can be ascertained, Formica's recent reduction in Plaintiffs' and putative class members' monthly retirement benefits has had and will continue to have consequences of such a nature and magnitude that absent preliminary and permanent injunctive relief requiring Formica to ensure that retirees receive monthly payments, whether from the Plan or from Formica Corporation or in combination, in the amount of their monthly benefit prior to January 2004, and enjoining Formica from reducing further the amount of Plaintiffs' pension benefits, Plaintiffs will suffer irreparable injuries for which they have no adequate remedy at law.

29. Alternatively, Formica and/or the Plan Administrators were acting as fiduciaries of the Plan when the negligently misrepresented the amount of monthly pension benefits to potential retirees to induce them to retire, thereby breaching their fiduciary duties to Plaintiffs. Accordingly, Plaintiffs may recover monetary and equitable relief under ERISA.

V. CLASS ALLEGATIONS

30. Plaintiffs maintain this action on behalf of themselves and other former Formica employees who accepted early voluntary retirement incentive packages from Formica from 1986 to the present based upon erroneous representations as to the amount of their monthly pension benefits and whose monthly retirement benefits have been or may be reduced as a result of alleged miscalculations of the amount of the retirement benefit.

31. Upon information and belief, approximately 295 individuals have been or will be affected by present or ongoing reductions in their monthly retirement benefit payments and thus comprise the putative class.

32. The members of the putative class are so numerous that joinder of individual claims is impracticable. Moreover, there are significant questions of fact and issues of law common to the members of the putative class. These issues include: a) whether Formica's representation to members of the class regarding the value of their specific pre-determined monthly pension benefits were false; b) whether, if false, these representations were deliberate or negligent; c) whether Formica was acting as a Plan fiduciary when it made misrepresentations in connection with its efforts to induce employees to retire; d) whether reliance by the class upon the accuracy of Formica's representations was foreseeable; e) whether if foreseeable, the putative class members reliance upon the false representations was reasonable; f) whether the putative class members suffered damages as a direct and proximate result of Formica's misrepresentation; and g) whether the Plan Administrators and/or Formica breached their fiduciary duties to Plaintiffs.

33. The claims of the named individuals and representative Plaintiffs are typical of the claims of the putative class. Plaintiffs and all members of the putative class have been damaged and victimized by their reasonable, foreseeable and detrimental reliance upon the false representations of Formica.

34. The proposed class representatives will fairly and adequately represent the putative class because they have been sworn to do so, they have the class members' interest in mind, their individual claims are co-extensive with and

identical or substantially similar to those of the class, and because they are represented by qualified counsel experienced in class action litigation and employment law.

35. A class action in this instance is superior to other available methods for the fair and efficient adjudication of these claims since individual joinder of the claims of all members of the putative class is impracticable. Most members of the class are without the financial resources necessary to pursue this matter. Even if some members of the class could afford to litigate their claims separately, such a result would be unduly burdensome to the courts in which the individualized cases would proceed. Individual litigation increases the time and expense of resolving a common dispute concerning Formica's conduct toward an entire group of retirees. Class action procedures allow for far fewer management difficulties in matters of this type and provide the unique benefits of unitary adjudication, economy of scale and comprehensive supervision over the entire controversy by a single court.

36. The putative class may be certified pursuant to Rule 23 (b)(1) of the Federal Rules of Civil Procedure because inconsistent or varying adjudications with respect to individual class members would establish incompatible standards of conduct for Formica to follow.

37. The putative class may also be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure because Formica has acted or refused to act on grounds generally applicable to the putative class thereby making final injunctive relief and corresponding declaratory relief appropriate with respect to the claims of the class.

38. The putative class may further be certified pursuant to Rule 23 (b)(3) of the Federal Rules of Civil Procedure because questions of law and fact common to class members will predominate over questions affecting individual members and a class action is superior to other methods for fairly and efficiently adjudicating the controversy and causes of action described in the Complaint.

39. The putative class may also be certified pursuant to the various subsections of the foregoing of Rule 23(b) of the Federal Rules of Civil Procedure for limited purposes with respect to the components of this case (i.e., bifurcation of liability and damages).

VI. STATEMENT OF CLAIMS

COUNT I

(State Claim - Negligent Misrepresentation)

40. Plaintiffs repeat and reaffirm the assertions of fact contained in paragraphs 1 through 39 herein above.

41. Formica had a duty to Plaintiffs to exercise due care in the provision of information which it knew would be relied upon by employees contemplating the major decision of whether to retire early or continue working. Formica breached that duty and provided inaccurate information to Plaintiffs. As a direct and proximate result, Plaintiffs have been severely damaged. The actions of Formica previously described constitute the tort of negligent misrepresentation.

COUNT II

(State Claim - Promissory Estoppel)

42. Plaintiffs repeat and reaffirm the assertions of fact contained in paragraphs 1 through 41 herein above.

43. Plaintiffs are alternatively entitled to recover under a theory of promissory estoppel. Formica made material representations to Plaintiffs to induce them to accept early retirement. Plaintiffs' reliance upon such representations was foreseeable and reasonable. Plaintiff's relied upon the representations of Formica to their great detriment by relinquishing their employment and related benefits and opportunities.

COUNT III

(ERISA - Breach of Fiduciary Duty)

44. Plaintiffs repeat and reaffirm the assertions of fact contained in paragraphs 1 through 43 herein above.

45. The Plan Administrators are fiduciaries with respect to the plan and pursuant to 29 U.S.C. § 1104 (a), and as such were and continue to be obligated to discharge their duties solely in the interest of the participants and beneficiaries who necessarily include Plaintiffs and the putative class members.

46. By reason of the fiduciary status of the Plan Administrators are obligated to exercise the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with the subject matter would use in the conduct of an enterprise of a like character and with like aims.

47. In breach of its foregoing fiduciary duty, the Plan Administrators, by and through its administrators and agents provided, or negligently allowed the provision of, materially false and inaccurate representations and information to Plaintiffs and members of the putative class regarding the amount of their monthly retirement benefits under the plan upon which Plaintiffs relied to their detriment when making the decision to retire and allowed Formica to shift company payroll obligations to the Plan.

COUNT IV

(ERISA - Breach of Fiduciary Duty)

48. Plaintiffs repeat and reaffirm the assertions of fact contained in paragraphs 1 through 47 herein above.

49. As an alternative to Plaintiffs' state law claims against Formica, Plaintiffs allege that in preparing, calculating and conveying information about future plan benefits to potential retirees, Formica was acting in a fiduciary capacity with respect to the administration of the plan.

50. Formica breached its fiduciary duty in the various ways detailed in Exhibit C and by inducing employees to retire on the basis of inaccurate and negligently calculated information, causing substantial harm to Plaintiffs and caused certain of its payroll obligations to be shifted to and paid from Plan assets.

COUNT V

(ERISA - Equitable Relief)

51. Plaintiffs repeat and reaffirm the assertions of fact contained in paragraphs 1 through 50 herein above.

52. By reason of the Plan Administrators' and Formica's actions and threatened course of action reducing the specified pre-determined value of Plaintiffs' and putative class members' monthly pension benefits, Plaintiffs and members of the putative class face immediate and irreparable harm for which there is no adequate remedy at law.

53. Under the circumstances described previously, Plaintiffs and the putative class members are entitled to appropriate equitable relief pursuant to 29 U.S.C. § 1132 (a)(3)(B) enjoining the Plan Administrators from reducing the monthly pension benefits of the Plaintiffs and the putative class, from recouping alleged over-payments made to Plaintiffs and members of the putative class and further requiring the Plan Administrators to reinstate the monthly pension benefits of all retirees who suffered reductions in or around January 2004 to the prior amount of such benefits.

54. Alternatively, Plaintiffs are entitled to appropriate equitable relief pursuant to 29 U.S.C. §1132 (a)(3)(B), requiring Formica Corporation to restore Plaintiffs' benefits either directly or through an appropriate contribution to the Plan.

VII. PRAYER FOR RELIEF

Plaintiffs, Benjamin Frank Ramsey, William Boyd, Elzie Halsey, Lucian Johnson, and Bruce Maybriar, and each of

them on behalf of himself and on behalf of the putative class, demand judgment against Formica Corporation and Formica Corporation Employee Retirement Plan as follows:

1. For an award of damages in an amount equal to the value of the lost back pay and employment benefits suffered by Plaintiff and the members of the putative class as a result of their decisions to relinquish their jobs and benefits upon the false representations of Defendants;

2. For declaratory and injunctive relief in favor of Plaintiffs and against Formica and/or the Plan Administrators, finding that these parties breached their fiduciary duties (of reasonable care or fiduciary) to members of the class by making false representations in connection with the effort to induce employees to retire.

3. For equitable relief temporarily, preliminarily and permanently enjoining the Plan Administrators from reducing the monthly pension benefits to Plaintiffs and members of the putative class and directing the Plan Administrators or Formica or both to restore Plaintiffs' benefits to their pre-January 2004 level;

4. For an award of reasonable attorney fees and costs incurred by Plaintiff and the members of the putative class in prosecuting this matter.

5. For an award of such other relief in law and equity to which Plaintiffs and the members of the putative class may be entitled under the premises.

Respectfully submitted,

MARC D. MEZIBOV
(Ohio Bar No. 0019316)
CHRISTIAN A. JENKINS
(Ohio Bar No. 0070674)
SUSAN E. BRABENEC
(Ohio Bar No. 0075200)
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Telephone (513) 723-1600
Telecopier (513) 723-1620

Counsel for Plaintiffs

Of Counsel:
Mark J. Wasserman (Ohio Bar No.: 0005569)

JURY DEMAND

Plaintiffs on behalf of themselves and the members of the putative class hereby demand that all questions of fact in the foregoing Complaint be tried to a jury.

/s/_____
MARC D. MEZIBOV
(Ohio Bar No. 0019316)

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February 2004 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to

Jack F. Fuchs, Esq.
THOMPSON HINE
312 Walnut Street, 14th Floor
Cincinnati, OH 45202-4089
ATTORNEY FOR DEFENDANT FORMICA CORPORATION AND DEFENDANT FORMICA CORPORATION RETIREMENT PLAN

/s/_____
MARC D. MEZIBOV
(Ohio Bar No. 0019316)

EXHIBIT A

NOTICE OF RETIREMENT AND RELEASE

I hereby voluntarily elect to retire from Formica Corporation ("Formica") under the provisions of the Early Retirement Incentive as outlined in your letter dated March 11, 1996.

I understand that the Early retirement Incentive was collectively bargained by Formica and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers Local No. 757 (the Union). With respect to the Early Retirement Incentive and in consideration for my being able to participate in the Early Retirement incentive, I hereby agree to release, revise, acquit and forever discharge Formica, BTR plc and the Union, and Formica's and BTR plc's directors, officers, agents, employees, parent companies, affiliates, subsidiaries, successors, and assignees and the Union's officers, agents, employees, members, affiliates, successors, and assignees, from any and all claims I, my personal representatives, successors or assigns had, have or may have with respect to my retirement and the separation of my employment from Formica including, but not limited to, claims under the Employee Retirement Income Security Act ("ERISA"), and any other statutes relating to employee benefits, the Age Discrimination in Employment Act ("ADEA"), as amended, Title VII of the Civil Rights Act of 1991, the Ohio Fair Employment Practice Law, or any other law, ordinance, rule or regulation.

I understand that I am encouraged and advised to consult with an attorney of my choosing concerning all of the terms and conditions of this release.

I understand that Formica and the Union have given me a reasonable time, of up to at least forty-five (45) days, for me to consider the terms and conditions of this release.

I understand that this Notice of Retirement and Release may be revoked by me by giving written notice of revocation to Formica within seven (7) days after the date this Notice of Retirement and Release is signed by me. This Notice and Release shall not become effective or enforceable until the revocation period has expired.

EXHIBIT B

FORMICA

Scott A. Smith
Corporate Vice President
Global Human Resources
10155 Reading Road
Cincinnati, OH 45241
(877) 393-8643 (w)
(866) 230-6423 (f)

January 2004

Gerald Eckel
7099 Pickway Dr,
Cincinnati, OH 45233

Dear Gerald:

In late 2002, Formica Corporation ("Formica") learned that a number of Pension Plan recipients were receiving incorrect pension benefits. The Benefits Committee selected a sample group of our retired Pension Plan participants and conducted an audit. The goal was to ensure that the recipients' pension benefits were calculated accurately so that beneficiaries were receiving the correct monthly payments. The results of the audit showed that some of these monthly pension payments were incorrect.

As a result, Formica promptly hired an independent actuarial firm, Mercer Human Resources Consulting, to determine the extent to which pension payments were miscalculated. During 2003, the actuarial firm reviewed and recalculated every beneficiary's pension payment and then confirmed the calculation. The review and recalculations disclosed that

certain beneficiaries are being paid incorrectly each month, some too high and some too low.

WHAT DOES THIS MEAN TO ME?

The recalculation audit showed that your current monthly benefit payment is more than your correct monthly benefit payment. The Pension Plan is required by the Internal Revenue Service ("IRS") to make payments in accordance with the proper benefit calculation. The Pension Plan will adjust your current pension payment to the correct monthly benefit payment at the end of January 2004. The employment information which forms the basis of your pension calculation is enclosed. The amount of your current monthly benefit and the correct monthly benefit are as follows:

Current Benefit Payment	$351.06
Correct Benefit Payment (Effective January 2004)	$207.80
Monthly Difference	-$143.26

We have informed the IRS of our audit findings and are in the process of reviewing this matter with respect to what to do about past overpaid benefits.

WHOM DO I CALL FOR QUESTIONS?

Beginning January 12, 2004, a representative will be available to answer questions you may have regarding your pension. You may call toll free 1-866-374-6422, Monday through Friday from 9:00 a.m, to 6:00 p.m. Eastern Standard Time to discuss your pension.

Please direct all your inquiries to the special toll-free number we have set up to address your questions.

To ensure the confidentiality of your information, you will need to provide your Personal Identification Number (PIN) when speaking with a representative.

Your PIN is: [redacted]

Should you wish to have someone else speak to a representative on your behalf, please complete the enclosed Consent Form and fax it to 1-866-230-6423 prior to contacting the Call Center. If you already have another individual who handles your personal matters and you have assigned that individual power of attorney privileges, please fax the Power of Attorney form to 1-866-230-6423.

WHAT IF I DON'T AGREE?

Step One: Initial Inquiry

If you do not agree with your corrected pension benefit, you may request documentation that details the calculation of your benefit and an explanation of the reason why the original calculation was incorrect. To request this documentation, call 1-866-374-6422. This information will be mailed to you generally within five to ten business days following your request.

Step Two: Request Reconsideration

As stated in the Pension Plan documents, you have a right to request reconsideration regarding your pension benefit. This reconsideration request should include an explanation of your request sent in writing to:

Formica Corporation
Attn: Pension Administrator
10155 Reading Rd.
Cincinnati, Ohio 45241-4805

You will receive a written response to your request within 90 days of receipt by Formica Corporation as the administrator of the Pension Plan, unless additional time (not to exceed an additional 90 days) is required to process your request, Included in that response will be:

- The specific reason or reasons for approval or denial of your request;
- The Pension Plan provision on which the decision was based;
- A request for any additional materials or information needed to make a decision; and
- An explanation of the Pension Plan's reconsideration request review process.

Step Three: Final Appeal

After receipt of the decision by Formica, you have the right to:

- Request further and final appeal of the decision by filing within 60 days of your receipt of the decision, a written application seeking a review of the decision with Formica Corporation, Attn: Pension Administrator, 10155 Reading Road, Cincinnati, Ohio 45241-4805;

- Review documents pertinent to the claim at a time and place mutually agreeable to you and the Plan Administrator; and

- Submit materials, issues and comments in writing to the Plan Administrator relating to the review of the decision on your appeal.

After consideration of your request for review, the Plan Administrator will make a decision and notify you in writing of that decision within 60 days, unless additional time (not to exceed an additional 60 days) is required to process the review. No legal action may be brought without exhausting this administrative process.

We are working diligently to correct these benefit issues as quickly as possible. Formica Corporation is committed to ensuring that our Pension Plan is administered correctly.

Sincerely,

Scott A. Smith
Corporate Vice President, Global Human Resources
Formica Corporation

EXHIBIT C

Thompson Hine

November 6, 2002

Via Certified Mail
Internal Revenue Service
Attn: T:EP:RA:VC
P.O. Box 27063
McPherson Station
Washington, D.C. 20038

RE: Formica Corporation, EIN: 34-1046753
Formica Corporation Employee Retirement Plan,
Plan No. 001 (the "Plan")

Employee Plans Compliance Resolution System (EPCRS)
Rev. Proc. 2002-47, 2002-29 IRB 119
Voluntary Correction Program (VCP)
Voluntary Correction of Operational Failures (VCO)

Dear Sir:

On behalf of Formica Corporation ("Formica"), the Plan Sponsor, we hereby request a Compliance Statement for the Plan under the Voluntary Correction Program pursuant to Rev. Proc. 2002-47 for the Voluntary Correction of the following Operational Failures of the Plan:

1. Exclusion of elective amounts from compensation (1995-98) *See* Parc C.
2. Incorrect early retirement methodology for prior pension offset (1985-98). See Part D.

3. Incorrect prior plan offset amounts (1985-98). *See* Part E.
4. Amendment absence for early retirement window benefits (1987, 1990). *See* Part F.
5. Miscellaneous calculation errors (various years), *See* Part G.

The administrator of the Plan is the Benefit Plans Committee of Formica Corporation (the "Plan Administrator"), All defined terms and Section references herein arc to Rev. Proc. 2002-47, unless otherwise indicated.

A. VCP/VCO QUALIFICATION

The Plan qualifies for VCP, and the VCO program thereunder, for the following reasons:

1. Qualified Plain. The Plain is a Qualified Plain under Sections 4.01(2) and 5.01(1) and a qualified retirement plan under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code").

2. Under Examination. The Plan is not Under Examination under Sections 4.03 and 5.03.

Tim.Brown@ThompsonHine.com Phone 513-352-6800
Fax 513-241-4771

3. Favorable Letter. The Plan is the subject of a Favorable Letter under Sections 4.04 and 5.01(4)(a), having a favorable IRS determination letter dated August 5, 2002, which covers all GUST law changes.

B. REQUIRED ITEMS

In support of its request, the Plan Sponsor provides the following required information and documentation:

1. Plan Sponsor Statement. The statement by the Plan Sponsor that the Plan is not Under Examination, and its Penalty of Perjury Statement, are provided in Attachment A.

2. Determination Letter Request. The Plan is not currently being considered by the IRS in a determination letter application.

3. Form 5500 Annual Report. From the Plan's most recent Form 5500 Annual Report for Plan Year ended December 31, 2001, a copy of the first page and pages containing employee census information and the total amount of assets are attached hereto as Attachment B.

4. Relevant Plan Provisions. The relevant portions of the plan documents for the Plan commencing from its inception effective May 30, 1985 through the present day are attached hereto as Attachment C.

5. Proposed Amendment. The Plan Sponsor shall submit the proposed Plan amendment described in this letter to the IRS in a determination letter application following approval by the IRS under this request for a Compliance Statement.

6. Favorable Letter. A copy of the Plan's Favorable Letter, i.e., its favorable IRS determination letter dated August 5, 2002, which covers all GUST law changes, is attached hereto as Attachment D.

7. VCO Fee. A certified check payable to the U.S. Treasury in the amount of $5,000 as the VCO fee for the Plan is attached hereto as Attachment E. The Plan has assets of at least $500,000 and more than 1,000 plan participants.

8. Power of Attorney. The Plan Sponsor's representatives making this request comply with the requirements of Section 9.02(11) and (12) of Rev. Proc. 2001-4, 2001 IRB 121 and a Form 2848 Power of Attorney is attached hereto as Attachment F.

9. Checklist. The VCP checklist from Appendix C of Rev. Proc. 2002-47, as executed by the Plan Sponsor's representative, is attached hereto as Attachment G.

C. OPERATIONAL FAILURE: EXCLUSION OF ELECTIVE AMOUNTS FROM COMPENSATION (1995-98)

(Listed Items Correspond to Sections 11.02(1)-(8))

1. Operational Failure. For retiree benefits commencing during plan years beginning on January 1, 1995 through December 31, 1998, Plan benefits were calculated by excluding from compensation elective contributions and amounts under Sections 401(k) and/or 125 of the Code, contrary to applicable provision of the Plan. *See* 1990 Plan, Section 1.20 (Code Section 401(k) amounts only), as amended effective May 1, 1992; 1996 Plan, Section 1.22 (Code Section 401(k) and 125 amounts); 1997 Plan, Section 1.22 (Code Section 401(k) and 125 amounts). Affected retirees received understated benefits paid in the form of an annuity and small (cashout) lump sun payments.

2. Administrative Procedures. The Plan Administrator had the following procedures in effect at the time of the Operational Failure: The Plan Sponsor would give specifications to its outside payroll providers regarding data and compensation to be transmitted (via tape) directly to the Plan Sponsor's actuary for the calculation of benefits and updating data of the Plan.

3. Failure Explanation. The Operational Failure arose as a result of the following reasons: The Plan Sponsor changed payroll providers in 1995 and gave data and compensation specifications to the new provider. The Plan Sponsor believes a former employee gave, in error, the wrong instructions to the payroll provider, who then transmitted incorrect compensation data to the actuary, which used such incorrect data in its calculation of benefits. The Plan Sponsor only recently discovered the error.

4. Correction Method. The Plan Sponsor corrected the Operational Failure in February 2002 by payment of single sum payments of understated benefit amounts with interest. The Plan Sponsor recalculated retiree benefits of 37 affected salaried retirees to include the excluded compensation amounts. The understated benefit amounts for some affected retirees were aggregated, increased with interest (as provided in item 5 below), then paid to the retiree in a single sum payment. Altogether, $44,802.29 was paid to retirees. The Plan has since paid the correct annuity amounts to these retirees going forward.

   Note: Certain of the foregoing 37 retirees had overpayments from the Operational Failures described below in Parts D and E. Upon review and correction of all errors, any overpaid benefits were netted against the underpaid amounts from this Operational Failure to reach

the actual amount paid to the affected retiree to correct this Operational Failure, The foregoing $44,802.29 aggregate correction amount reflects this netting of underpaid and overpaid benefits.

The Plan Sponsor is continuing to determine the participants affected by this Operational Failure and the proper amount of their benefits, In this regard, the Plan Sponsor has not yet checked the non-union hourly employees of the Plan and their understated benefit amounts. Note: All union employees are subject to benefit multipliers under the Plan, so their benefits are not based on compensation and are therefore unaffected by this Operational Failure.

Consistent with the foregoing 37 participants, the understated benefit amounts of any remaining affected retiree will be aggregated, netted by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such net underpaid amount will be paid to the retiree in a single sum payment. The Plan Sponsor expects understated benefit amounts to be paid to affected retirees in an aggregate amount as yet determined. Thereafter, the Plan would pay the correct benefit amount going forward.

5. Earnings, Actuarial Assumptions. The aggregate understated benefit amounts under Item 4 were increased (as noted) with interest using the applicable interest rate under Code Section 417(e) as in effect under the Plan for the Plan Year(s) during which the benefit amounts were unpaid, compounded monthly. No special actuarial assumptions were used to determine the understated benefit amounts or single sum payment amounts.

6. Specific Calculations. Examples of specific calculations of the foregoing amounts for a representative sample of affected retirees are attached hereto in Attachment H.

7. Finding, Notifying Participants. The Plan Sponsor notified affected retirees of underpaid benefits by sending a letter to the current address of the retiree, and the Trustee of the Plan is now sending correct benefit amounts to these retirees. The Trustee has procedures in place to confirm receipt of benefits.

8. Future Administrative Procedures. The Plan Administrator will institute the following measures to ensure that the same failure will not recur: The Plan Sponsor will review for accuracy the paper (hard) copies of the payroll tapes that are given to the actuary and confirms that the payroll provider is including the correct data in the payroll tapes that are sent to the actuary, The foregoing procedure will occur before the payroll provider transmits the data (via tape) directly to the actuary,

D. OPERATIONAL FAILURE: INCORRECT EARLY RETIREMENT METHODOLOGY FOR PRIOR PENSION PLAN OFFSET (1985-98)

(Listed Items Correspond to Sections 11.02(1)-(8))

Formica Corporation was divested from the American Cyanamid Company effective May 29, 1985. As a result of such divestiture, the Plan provides for past service and compensation credit with American Cyanamid Company prior to May 30. 1985, with an offset for benefits payable from the American Cyanamid Company Employees Retirement Plan (the "American Cyanamid Plan").

The offset from the American Cyanamid Plan was based on the pension formula of the American Cyanamid Plan as of May 29, 1985 (as provided in the Plan), calculated using (i) service and compensation with the American Cyanamid Company prior to May 30, 1985 and (ii) limited compensation with Formica on and after May 30, 1985 through December 31, 1990, based on a special 6% maximum compensation increase methodology provided under file Plan.

The Operational Failures described in Parts D and E of this letter relate to the methodology and amounts of the benefit offset from the American Cyanamid Plan.

1. Operational Failure. For retiree benefits commencing during plan years beginning on January 1, 1990 through December 31, 1998, Plan benefits were calculated consistent with the 1985 Plan document as carried through in all subsequent Plan documents, *i.e.*, by offsetting early retirement benefits by the early retirement benefit from the American Cyanamid Plan *(see* first Note below), but in some cases were calculated using the Plan's accrued benefit amount at age 65 (normal retirement age) offset by the accrued benefit amount at age 65 (normal retirement age) under the American Cyanamid Plan. *See* 1985 Plan, Section 5.3(b)(ii)(B)(3% reduction for gross benefit amount; 6-2/3% and 3-1/3% for Primary Social Security Benefit, resulting in an early retirement offset methodology); 1990 Plan, Section 1.54 (Prior Plan Benefit, from 1985 Plan document), 5.03 (Early Retirement Benefit), Appendix B, section (C) (accrued benefit under predecessor to 1990 Plan); 1996 Plan, Sections 5.03, 5.06; 1997 GUST restatement, Sections 5.03, 5.06.

Note: The 1985 Plan document provides that an early retirement benefit using the "Final Pay Minimum Benefit" minimum benefit of Section 5.1(b) is calculated on an early retirement offset basis. *See* 1985 Plan, Section 5.3(b)(ii)(B) (3% reduction for gross benefit amount; 6-2/3% and 3-1/3% for Primary Social Security Benefit; also referred to as a "two-piece" reduction in Part E. 1 .B). This early retirement offset applied only to the Final Pay Minimum Benefit formula under Section 5.1 (b), but all participant's benefits were calculated using this formula since it was greater than the amount under Section 5.1(a) (which appears to provide for an age 65 offset approach). Further, the vested benefit of Section 5.3(d) appears to provide for an age 65 offset approach, but all early retirement reductions were based on general actuarial equivalence, so the same result is reached with an early retirement offset approach. Retiree benefits commencing under the 1985 Plan document, *i.e.*, during plan years beginning on May 30, 1985 through December 31, 1989, were uniformly calculated for all participants by offsetting early retirement benefits by the early retirement benefit from the American Cyanamid Plan.

Note: For retiree benefits commencing during plan years beginning on January 1,1999 and thereafter, Plan benefits also were uniformly calculated for all participants by offsetting early retirement benefits by the early retirement benefit from the American Cyanamid Plan, consistent with the 1996 and 1997 Plan documents. *See* 1996 Plan, Sections 5.03, 5,06; 1997 GUST restatement, Sections 5.03, 5.06.

2. Administrative Procedures. The Plan Administrator had the following procedures in effect at the time of the Operational Failure: The Plan Sponsor internally calculated pension benefits under the Plan, based on certain employees' understanding of the specific

calculation method then in effect under the terms of the Plan. Effective January 1, 1999, the Plan Sponsor hired its outside actuary to perform benefit calculations.

3. Failure Explanation. The Operational Failure arose as a result of the following reasons: The Plan Sponsor failed to ensure that responsible employees fully understood the terms of the Plan regarding the methodology of calculating the offset of benefits under the American Cyanamid Plan.

4. Correction Method. The Plan Sponsor would correct the Operational Failure by increasing the benefits of those 1990-1998 retirees who received understated benefits as a result of their benefit being calculated using the age 65 normal retirement offset approach, rather than the early retirement offset approach provided by the 1985 and 1990 Plan documents,

The understated benefit amounts of any affected retiree will be aggregated, netted by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such net underpaid amount will be paid to the retiree in a single sum payment. Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

If any such 1990-1998 retiree received overpaid benefits as a result of his benefit being calculated using the normal retirement offset approach, his future benefit would be reduced to the correct amount (determined using an early retirement offset approach), then further reduced actuarially to recoup the previous overpaid benefits. However, the Plan Sponsor is evaluating the right to seek and efficacy of seeking recoupment of overpaid benefits.

The Plan Sponsor determined that approximately 101 retirees were affected by the Operational Failure, with (i) cumulative underpayments estimated at $51,000 and (ii) cumulative overpayments estimated at $243,000.

5. Earnings, Actuarial Assumptions. The aggregate understated benefit amounts under Item 4 would be increased (as noted) with interest using the applicable interest rate under Code Section 417(e) as in effect under the Plan for the Plan Year(s) during which the benefit amounts were unpaid, compounded monthly. No special actuarial assumptions would be used to determine the understated benefit amounts or single sum payment amounts.

   Regarding overpaid benefits, the Plan Sponsor would calculate the actuarial reduction for previous overpaid benefits using the Plan's general actuarial assumptions used for conversion of optional annuity forms, i.e., 6.5% interest and the 1971 TPF&C Forecast Mortality Table on a male basis with participant ages set back one year and beneficiary ages set back five years. *See* 1997 Plan, Sections 1.53, 1.03.

6. Specific Calculations. Examples of specific calculations of the foregoing amounts for a representative sample of affected retirees are set forth in Attachment I.

7. Finding, Notifying Participants. The Plan Sponsor would notify affected retirees of the underpaid benefits by sending a letter to the current address of the retiree as soon as administratively feasible after receipt of the IRS Compliance Statement.

8. Future Administrative Procedures. The Plan Administrator will institute the following measures to ensure that the same failure will not recur: The Plan Sponsor will clearly and accurately document the procedures for calculating benefits and will have such calculations checked or prepared by the outside actuary.

E. OPERATIONAL FAILURE:
INCORRECT PRIOR EARLY RETIREMENT AMOUNTS FOR PRIOR PENSION PLAN OFFSET(1985-98)
(Listed items Correspond to Sections 11.02(1)-(8))

1. Operational Failures. For retiree benefits commencing during plan years beginning on May 30, 1985 through December 31, 1998, Plan benefits were calculated using incorrect early retirement benefit offset amounts from the American Cyanamid Plan (the "American Cyanamid Offset Amounts"). The incorrect American Cyanamid Offset Amounts are due to the following reasons:

   A. Under the 1985 Plan document, as effectively carried through in subsequent Plan documents, the Plan provided that a participants American Cyanamid Offset Amount was calculated using post-May 30, 1985 compensation with Formica using a. special 6% maximum compensation increase methodology taking into consideration the previous plan year's increase in compensation, *See* 1985 Plan, Section 5.1(c)(ii)(B); 1990 Plan, Appendix B, section (C); 1996 Plan, Section 5.01 (a)(2); 1997 Plan, Addendum A, section (2). However, for the period from May 30, 1985 through December 31, 1990, the American Cyanamid Offset Amounts for a number of participants (*i.e.*, retirees commencing during this time period and other participants) were calculated based on an incorrect

application of the special 6% methodology, resulting in overpaid and underpaid benefits,

B. Under the 1985 Plan document, as effectively carried through in subsequent Plan documents, the Plan provided that a participant's American Cyanamid Offset Amount was calculated using a "two piece" early commencement reduction methodology, *i.e.*, (i) a "base" reduction factor for the "gross" portion of the American Cyanamid early, retirement benefit, equal to generally .25% monthly for a participant who met Rule of 65 points and (ii) a "Social Security" reduction factor for the "PIA offset" portion of the American Cyanamid early retirement benefit, equal to the 1/180 for the first 60 months and 1/360 for the next 60 months. *See* 1985 Plan, Section 5.3(b)(ii)(B); 1990 Plan, Appendix B, section ((2); 1996 Plan, Section 5.01(a)(2), (3); 1997 Plan, Addendum A, section (2), (3). However, for retirees commencing benefits during the period from January 1, 1990 through December 31, 1998, the American Cyanamid Offset Amount was calculated on a "'one piece" early commencement reduction methodology, *i.e.*, a "'base" reduction factor for the entire American Cyanamid early retirement benefit, equal to generally .25% monthly for a participant who met Rule of 65 points, resulting in overpaid and underpaid benefits.

C. Under the 1985 Plan document, as effectively carried through in subsequent Plan documents, the Plan provided that a participant's American Cyanamid Offset Amount was calculated based on the pension formula of the American Cyanamid Plan as of May 29, 1985 (as provided in the Plan),calculated using (I) service and compensation with the American

Cyanamid Company prior to May 30, 1985 and (ii) limited compensation with Formica on and after May 30, 1985 through December 31, 1990, baaed on a Special 6% maximum compensation increase methodology provided under the Plan. The 1985 Plan did not further reduce the American Cyanamid Offset Amount by the "QPSA charge" applicable under the American Cyanamid Plan to terminated vested, participants for spouse preretirement death benefit coverage, *See* 1985 Plan, Section 5.1(c); 1990 Plan, Appendix B, section (C); 1996 Plan, Section 5.01(a)(3); 1997 Plan, Addendum A, section (3). However, for the period from May 30, 1985 through December 31, 1995, the American Cyanamid Offset Amount was consistently reduced for the QPSA charge, resulting in overpaid benefits.

D. Under all Plan documents, the Plan provided that a participant's American Cyanamid Offset Amount was based on a single life annuity. *See* 1985 Plan, Section 5.1(c); 1990 Plan, Appendix B, section (C); 1996 Plan, Section 5.01(a)(3); 1997 Plan, Addendum A, section (3). However, for the period from May 30, 1985 through December 31, 1998, for certain isolated participants, the American Cyanamid Offset Amount was based on the Plan's qualified joint and survivor annuity (QJSA) or other annuity forms (instead of the single life annuity), resulting in overpaid benefits.

2. Administrative Procedures. The Plan Administrator had the following procedures in effect at the time of the Operational Failures: The Plan Sponsor calculated benefits under the American Cyanamid Plan using the Plan Sponsor's schedule of accrued benefit amounts of its Plan participants under the American Cyanamid Plan, the Plan

Sponsor's known supporting compensation and service data, certain assumptions made by the Plan Sponsor, and its understanding of how accrued benefit and early retirement benefit amounts were calculated under the American Cyanamid Plan.

3. Failure Explanation. The Operational Failures arose as a result of the following reasons: The Plan Sponsor did not properly calculate the American Cyanamid Offset Amount due the inaccuracy of its own benefit data under the American Cyanamid Plan and its misunderstanding of how such Offset Amounts were calculated thereunder.

4. Correction Method. The Plan Sponsor proposes to correct the Operational Failures by recalculating benefits using the correct American Cyanamid Offset Amount consistent with the early retirement benefit methodology in Part D of this letter. In more specific terms:

   A. Regarding the special 6% maximum compensation increase methodology *(see* item 1.A above), the Plan Sponsor will recalculate American Cyanamid Offset amount using the correct application of the 6% methodology prescribed by the 1985 Plan document.

      Any understated benefit amounts of any affected retiree will be aggregated, netted by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such net underpaid amount will be paid to the retiree in a single sum payment. Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

If any affected retiree received overpaid benefits as a result of his benefit being calculated using the incorrect application of the 6% compensation methodology, his future benefit would be reduced to the correct amount (determined using the correct 6% compensation methodology), then further reduced actuarially to recoup the previous overpaid benefits. However, the Plan Sponsor is evaluating the right to seek and efficacy of seeking recoupment of overpaid benefits.

B. Regarding the "'two-piece" early commencement reduction methodology *(see* item 1.B above), the Plan Sponsor will recalculate American Cyanamid Offset Amounts using the "two piece" methodology described in Section 2.B above, as prescribed by the 1985 Plan document.

Any understated benefit amounts of any affected retiree will be aggregated, netted by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such net underpaid amount will be paid to the retiree in a single sum payment. Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

If any affected retiree received overpaid benefits as a result of his benefit being calculated using the "'one-piece" methodology, his future benefit would be reduced to the correct amount (determined using the correct "two-piece" methodology), then further reduced actuarially to recoup the previous overpaid benefits. However, the Plan Sponsor is evaluating the

right to seek and efficacy of seeking recoupment of overpaid benefits.

C. Regarding the "QPSA charge" reduction (*see* item 1.C above), the Plan Sponsor will not recalculate American Cyanamid Offset Amounts, but will adopt an amendment to the Plan to provide for the QPSA charge reduction.

Note: the American Cyanamid Plan no longer reduces its benefits for the QPSA charge, including eliminating the prior reduction, effective for participants commencing benefits on and after January 1, 1996. Accordingly, the current Plan benefit amount (higher as a result of the QPSA charge reduction to the American Cyanamid Offset Amount) will continue to be paid going forward, even though higher than without the QPSA charge. Of course, the Plan would not recoup any previous overpaid benefits, nor actuarially reduce future benefits for the overpaid benefits.

D. Regarding the QJSA or other annuity forms (instead of the single life annuity) offset amount (*see* item 1.D above), the Plan Sponsor will recalculate American Cyanamid Offset Amount using the correct single life annuity amount prescribed by the Plan documents.

Any understated benefit amounts of any affected retiree will be aggregated, netted by any overpaid benefits from arty other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such net underpaid amount will be paid to the retiree in a single

sum payment. Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

If any affected retiree received overpaid benefits as a result of his benefit being calculated using the QJSA or other annuity amount, his future benefit would be reduced to the correct amount (determined using the correct single life annuity amount), then further reduced actuarially to recoup the previous overpaid benefits. However, the Plan Sponsor is evaluating the right to seek and efficacy of seeking recoupment of overpaid benefits.

The Plan Sponsor determined that approximately 305 Participants were affected by the Operational Failures, with (i) cumulative underpayments estimated at $826,000 and (ii) cumulative overpayments estimated at $100,000.

5. Earnings, Actuarial Assumptions. The aggregate understated benefit amounts under Item 4 would be increased (as noted) with interest using the applicable interest rate under Code Section 417(e) as in effect under the Plan for the Plan Year(s) during which the benefit amounts were unpaid, compounded monthly. No special actuarial assumptions would be used to determine the understated benefit amounts or single sum payment amounts.

   Regarding overpaid benefits, the Plan Sponsor would calculate the actuarial reduction for previous overpaid benefits using the Plan's general actuarial assumptions used for conversion of optional annuity forms, *i.e.*, 6.5% interest and the 1971 TPF&C Forecast Mortality Table on a male basis with participant ages set back one year and

beneficiary ages set back five years. *See* 1997 Plan, Sections 1.53, 1.03.

6. Specific Calculations. Examples of specific calculations of the foregoing amounts for a representative sample of affected retirees are attached hereto as Attachment J.

7. Finding, Notifying Participants. The Plan Sponsor would notify affected retirees of the foregoing correction by sending a letter to the Correct address of the retiree as soon as administratively feasible after receipt of the IRS Compliance Statement.

8. Future Administrative Procedures. The Plan Administrator will institute the following measures to ensure that the same failure will not recur: The Plan Sponsor now obtains actual benefit amounts under the American Cyanamid Plan directly from the American Cyanamid Company's successor, Wyeth.

F. OPERATIONAL FAILURE:
AMENDMENT ABSENCE FOR EARLY RETIREMENT WINDOW BENEFITS (1997, 1990)
(Listed Items Correspond to Sections 11.02(1)-(8))

1. Operation Failure. For early retirement window benefit programs approved by Formica in 1987 and 1990, the Plan was not formally amended to provide for the enhanced benefits under the programs.

2. Administrative Procedures. The Plan Administrator had the following procedures in effect at the time of the Operational Failures: The Plan Sponsor's Human Resource Department was responsible for assuring the Plan was properly amended for Plan benefit changes.

3. Failure Explanation. The Operational Failures arose as a result of the following reasons: The Plan Sponsor's Human Resource Department did not realize that formal Plan amendments were required for early retirement window programs.

4. Correction Method. The Plan Sponsor proposes to correct the Operational Failures by the adoption of an amendment to the Plan to provide for the early retirement window program. Accordingly, the current Plan benefit amount (higher as a result of the window programs) will continue to be paid going forward, even though higher than as otherwise provided under the Plan.

   The Plan Sponsor determined that approximately 103 retirees were affected by the Operational Failure.

5. Earnings, Actuarial Assumptions. No earnings or actuarial assumptions are applicable.

6. Specific Calculations. No specific calculations arc applicable.

7. Finding, Notifying Participate. No necessity to contact affected retirees is applicable.

8. Future Administrative Procedures. The plan Administrator will institute the following measures to ensure that the same failure will not recur: The Plan Sponsor's Legal Department will undertake responsibility for proper and timely adoption of all Plan amendments.

G. OPERATIONAL FAILURES: MISCELLANEOUS CALCULATION ERRORS (various years)

(Listed Items Correspond to Sections 11.02(1)-(8))

1. Operational Failures. For retiree benefits during various plan years, Plan benefits were calculated incorrectly for the following miscellaneous reasons:

   A. Under all the Plan documents, a reduction for early commencement applies based on the age of the participant at time of commencement. However, the ages of certain participants were not determined correctly, resulting in overpaid and underpaid benefits.

   B. Under all the Plan documents, a retirement benefit cannot be less than any previously payable early retirement benefits as required by Section 41 l(a)(9) of the Code (the "early retirement minimum benefit), However, Formica as Plan Administrator did not verify this Plan and legal requirement, and as a result underpaid benefits may result.

   C. Certain various miscellaneous errors occurred for plan years beginning after December 31, 1998:

2. Administrative Procedures. The Plan Administrator had the following procedures in effect at the time of the Operational Failures: The Plan Sponsor calculated benefits under the Plan based on general calculation procedures.

3. Failure Explanation. The Operational Failures arose as a result of the following reasons: The Plan Sponsor did not properly calculate ages due to human error. Also, the Plan

Sponsor did not know the necessity to calculate the early retirement minimum benefit.

4. Correction Method. The Plan Sponsor proposes to correct the Operational Failures in the following manner:

   A. Regarding the age miscalculation *(see* item 1.A above), the Plan Sponsor will determine the correct benefit reduction amount based on the participant's proper age.

      Any understated benefit amounts of any affected retiree will be aggregated, netted by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such net underpaid amount will be paid to the retiree in a single sum payment. Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

      If any affected retiree received overpaid benefits as a result of the miscalculation of his age, his future benefit would be reduced to the correct amount (determined using his or her correct age), then further reduced actuarially to recoup the previous overpaid benefits, However, the Plan Sponsor is evaluating the fight to seek and efficacy of seeking recoupment of overpaid benefits.

   B. Regarding the early retirement minimum benefit *(see* item 1.8 above), the Plan Sponsor will calculate each participant's early retirement minimum benefit to confirm his or her current payment amount exceeds his early retirement minimum benefit amount.

Any understated benefit amounts of any affected retiree will be aggregated, netted by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate, and then such not underpaid amount will be paid to the retiree in a single sum payment, Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

The Plan Sponsor also will adopt a Plan amendment which will clarify that the early retirement minimum benefit will not apply to subsidized benefits, such as the Plan's subsidy of full early retirement benefits where the Plan's early retirement benefit commences before the American Cyanamid Plan benefits is eligible for commencement.

C. Regarding the various miscellaneous errors, the Plan Sponsor will calculate each participant's correct benefit amount.

Any understated benefit amounts of any affected retiree will be aggregated, nettgd by any overpaid benefits from any other Operational Failure described in this letter, then increased with interest (as provided in item 5 below) as appropriate and then such net underpaid amount will be paid to the retiree in a single sum payment. Thereafter, the Plan would thereafter pay the correct benefit amount going forward.

If any affected retiree received overpaid benefits as a result of the error, his future benefit would be reduced to the correct amount, then further reduced actuarially to recoup the previous overpaid benefits. However, the

Plan Sponsor is evaluating the right to seek and efficacy of seeking reeoupment of overpaid benefits.

The Plan Sponsor determined that approximately 15 retirees were affected by the Operational Failures, with (I) cumulative underpayments estimated at $2,000 and (ii) cumulative overpayments estimated at $7,000.

5. Earnings, Actuarial Assumptions. The aggregate understated benefit amounts under Item 4 would be increased (as noted) with interest using the applicable interest rate under Code Section 417(e) as in effect under the Plan for the Plan Year(s) during which the benefit amounts were unpaid, compounded monthly. No special actuarial assumptions would be used to determine the understated benefit amounts or single sum payment amounts.

   Regarding overpaid benefits, the Plan Sponsor would calculate the actuarial reduction for previous overpaid benefits using the Plan's general actuarial assumptions used for conversion of optional annuity forms, *i,e*, 6.5% interest and the 1971 TPF&C Forecast Mortality Table on a male basis with participant ages set back one year and beneficiary ages set back five years. *See* 1997 Plan, Sections 1.53, 1.03.

6. Specific Calculations. Examples of specific calculations of the foregoing amounts for a representative sample of affected retirees are attached hereto as Attachment K.

7. Finding, Notifying Participants. The Plan Sponsor would notify affected retirees of the foregoing correction by sending a letter to the current address of the retiree as soon

as administratively feasible after receipt nf the IRS Compliance Statement.

8. Future Administrative Procedures. The Plan Administrator will institute the following measures to ensure that the same failure will not recur: The Plan Sponsor will utilize more personnel to cheek ages of participants. The Plan Sponsor's actuary will track and check curly retirement minimum benefit amounts and confirm they do not exceed a participant's actual retirement benefit.

H. TIMING OF CORRECTION METHOD
(Section 11.02(4))

All of the foregoing corrections would be made within 150 days of the IRS issuance of the Compliance Statement. The filing of the Plan amendment with the IRS for the QPSA charge, window programs and early retirement minimum benefit for a determination letter would be made as soon as practicable following your approval thereof as the correction method.

If you have any questions, please contact the undersigned.

Sincerely,

/s/

Timothy R. Brown

cc: Formica Corporation (w/att.)
Earl Banner
Ned Case
Scott Smith

(2)

Supreme Court, U.S.
FILED
JUN 13 2005
OFFICE OF THE CLERK

No. 04-1510

In the Supreme Court of the United States

BENJAMIN FRANK RAMSEY; WILLIAM BOYD; GERALD ECKEL; ELZIE HALSEY; LUCIAN JOHNSON; BRUCE MAYBRIAR, on behalf of themselves and all members of the putative class,
Petitioners,

v.

FORMICA CORPORATION; FORMICA CORPORATION BENEFIT PLAN COMMITTEE; SCOTT A. SMITH; EDWARD R. CASE; EARL M. BENNETT; FRANK A. RIDDICK, III,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Respondent Formica Corporation discloses that it is not a subsidiary of a publicly owned corporation, nor does any publicly held company own 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

I. Formica's Reductions in Force

Formica Corporation was spun off from American Cyanamid Company in 1985. Since 1985, Formica Corporation has gone through several reorganizations and changes of ownership; Formica Corporation filed a bankruptcy petition on March 5, 2002 and emerged on June 10, 2004 from reorganization under Chapter 11 of the Bankruptcy Code.

In the early 1970's, Formica Corporation employed over 1,400 union personnel in Cincinnati, Ohio. Since then, the number of Formica Corporation's represented workers has declined to less than half that size, partially through voluntary retirement programs and partially through involuntary reductions in force.

Apart from the voluntary retirement programs and the involuntary reductions in force, many Formica Corporation employees retired in the ordinary course; for example, Petitioner Boyd retired in January 1995 voluntarily and without the receipt of any incentives.

II. Formica's 1986 and 1996 Early Retirement Programs

In 1986, Formica offered to 52 employees, including Petitioner Ramsey, an early retirement program that allowed the employees to retire with a 10% increase in service for pension calculation purposes, the provision of an early retirement subsidy so that the 3% per year reduction in benefits for retirements prior to age 65 did not occur, the provision of a Social Security bridge payment whereby retirees under 62 would receive an amount equal to the Social

Security payment that they would have received if they had been 62, and a lump sum distribution of $400 per year of service. All of the persons eligible for the program took early retirement. Ramsey received each of these benefits.

In 1996, Formica Corporation offered a different early retirement program that provided for a bridge payment of $1,000 per month until the employee reached age 62 to employees whose age and service equaled or exceeded 90. Indeed, Formica's letter offering the program expressly identified this bridge payment as the only incentive for early retirement: "The incentive is $1,000 per month to be paid to you until your 62nd birthday." (Opposition Appendix A at 1b). The amounts of this incentive varied; for Petitioner Maybriar, the bridge payments totaled $67,000.

III. Petitioners Base Their Claims on "Estimates" That Are "Subject to Changes" and "Are Approximate Based on the Current Data Available"

As part of Formica's voluntary retirement programs in 1986 and 1996, some Formica retirees received documents that expressly identified future Plan pension benefits as "estimates." (Opposition Appendix C at 6b). These documents did not guarantee any pension benefit amount. As an example, the Maybriar "Total Estimate" states in bold: **"All estimates are subject to changes in Plan provisions and Social Security law."** (*Id.*). Indeed, Maybriar acknowledges that he understood he was not receiving a guaranteed benefit when he read the "Total Estimate" document, which expressly states that "[t]he calculations for this estimate are **approximate** based on the current data available." (*Id.*). Petitioner Ramsey's statement of benefits expressly undermines any claim that he relied on a specific calculation of benefits in electing to take early retirement:

"The benefits provided on this statement are estimates only. Your actual pension benefit will be calculated following your election to retire." (Opposition Appendix B at 4b).

IV. The Plan's 2002 Discovery of Erroneous Pension Payments

In 2002, Towers Perrin, then Formica's actuary, undertook an audit of the payments to 37 Formica retirees and determined that most retirees had been receiving inaccurate pension benefits from the Plan. When the issue was brought to the Formica Corporation Benefit Plan Committee ("Committee"), the decision was made that no benefits payments would be changed until the Committee was completely confident what the issues were and that they were taking the correct action.

Formica engaged Mercer Human Resource Consulting ("Mercer") in August 2002 to sample the Plan's pension payments to determine if there were larger issues with the Plan's calculation of pension benefits for the 37 retirees initially sampled. Mercer determined that there were a significant number of errors in the Plan's pension calculations.

V. The Plan's 2002 Use of the IRS's Voluntary Correction Program

As a result of Mercer's initial sample that identified significant problems, the Committee, in fulfillment of its fiduciary duties, took two actions. First, the Committee engaged Mercer to undertake a detailed examination of each retiree's pension benefit calculations to determine the correct Plan pension amount. Second, to protect the tax-qualified status of the Plan, the Committee determined to seek approval

from the IRS for a correction plan. Following the IRS guidelines in Rev. Proc. 2002-47 for the voluntary correction of the operational failures of the Plan, the Plan submitted to the IRS a Compliance Statement for the Plan on November 6, 2002. (Petition Appendix D at 49a-73a).

In the Compliance Statement, Formica identified its intention to correct all erroneous payments, reducing future payments to the amounts determined to be proper for retirees who had been overpaid, while making lump sum payments and increasing future payments to retirees who had been underpaid. In submitting the Compliance Statement, the Plan sought to implement Rev. Proc. 2002-47, which mandates (at a minimum) the reduction to the correct amount of any Plan pension payments in excess of the amount established by the Plan. Rev. Proc. 2002-47. Although the Committee knew by the time that the Compliance Statement was submitted to the IRS that there were erroneous calculations, the Committee determined not to alter benefits until Mercer completed its review and confirmed all retiree pension calculations.

VI. Mercer's November 18, 2003 Report to the Committee

Beginning in late 2002 and continuing through 2003, Mercer undertook to review all Plan pension calculations. Based on its review of the best available documents, Mercer submitted to the Committee a report, dated November 18, 2003, that summarized the results of Mercer's examination.

In its report, Mercer detailed that of 624 retirees participating in the Plan, miscalculations had resulted in 173 retirees being underpaid and 295 retirees being overpaid. The Mercer report identified the nature of the miscalculations and the financial impact on the Plan and the Plan participants.

VII. The Committee's Action

Acting on the Mercer report, the Committee determined that the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and federal common law, as well as IRS and Department of Labor regulations and pronouncements, required the adjustment of future payments to the correct amounts. Acting as quickly as possible, Formica implemented the corrections for both overpaid and underpaid retirees in January 2004 by providing a lump sum equal to past underpayments plus interest and increasing the amounts due those historically underpaid to the correct amount, while decreasing to the correct amount those historically overpaid. To date, the Plan has not sought to recoup past overpayments.

VIII. The Petitioners' Claims

In the Amended Complaint, Petitioners advance breach of fiduciary duty claims under ERISA and state-law negligent misrepresentation and promissory estoppel claims against Formica based on alleged misrepresentations involving pension benefits. Petitioners seek monetary damages and purport to seek unspecified equitable relief.

In seeking interlocutory relief, Petitioners ask the District Court to award money damages, *viz.*, an increase in "monthly pension benefit payments to Plaintiffs and each member of the putative class." Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction at 1. Petitioners repeatedly reaffirmed their claim for benefits in statements before the District Court on February 20, 2004. In effect, Petitioners seek money damages equal to the amount of pension benefits to which they claim they are entitled.

SUMMARY OF THE ARGUMENT

This case does not present any of the traditional reasons for granting a Petition for a Writ of Certiorari. *See generally* Supreme Court Rule 10(a)-(c) (setting forth the reasons that typically present a sufficiently compelling justification for this Court to issue a writ of certiorari). This case does not present conflicting judicial decisions on an important matter; there has not been any departure from settled Supreme Court decisions by the lower courts warranting the exercise of this Court's supervisory power; and this case does not present an important question of federal law that has not yet been settled by this Court.

As part of the regular administration of its Pension Plan, Petitioner Formica was informed by its actuaries that the initial calculations of some retirees' pension payments were mistaken. Formica commissioned a review of the payments to all plan participants and discovered numerous under - and overpayments. Formica corrected the errors, making up underpayments, and providing each retiree with the properly calculated benefits under the Plan going forward. Internal Revenue and Department of Labor regulations permit no alternative action. Petitioners seek to compel Formica to pay them more than Petitioners are entitled to under the terms of the Plan. To do so would violate federal pension and tax law, while endangering the rights of all current and future retirees of the Plan, which is currently underfunded.

Section 502 of ERISA, *codified at* 29 U.S.C. § 1132, provides a "comprehensive and reticulated" scheme for statutory enforcement. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Section 502(a)(3) of ERISA, under which Petitioners seek to enforce their breach of fiduciary duty claim, permits "other appropriate equitable

relief." 29 U.S.C. § 1132(a)(3). In its previous decisions, the Court has conclusively delineated the meaning of the phrase "other appropriate equitable relief" to exclude the payment of monetary damages, even when the requested relief is couched in terms of injunctive relief. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993); *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 210 (2002). The District Court and the Court of Appeals, following this Court's precedent, correctly held that the payment of money, which Petitioners seek in this action, in excess of the amounts to which they are entitled under Formica's Plan, is not equitable relief available under ERISA.

Petitioners claim that this Court should ignore plain statutory language and abandon its well-developed analysis of ERISA § 502(3)(a) in order to create a "make-whole" remedy. Petitioners' arguments regarding "traditional trust law" and general statements of the purpose of Congress in enacting ERISA have been fully considered and rejected by this Court. *See Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004). Furthermore, Petitioners fail to muster any evidence of "disarray" in the circuits in this regard.

Equally well established are ERISA's preemptive powers. Just last year, the Court revisited this issue in *Davila*, confirming "the clear congressional intent to make the ERISA remedy exclusive." *Davila*, 542 U.S. 200, 124 S. Ct. at 2495. ERISA preempts any state-law actions that "relate to an employee benefit plan." ERISA § 514(a), *codified at* 29 U.S.C. § 1144(a). Petitioners' state-law claims for negligent misrepresentation and promissory estoppel, which seek to alter the payments Petitioners are entitled to receive pursuant to Formica's Pension Plan, fall squarely within ERISA's preemptive powers.

Finally, the Court should deny certiorari because the record is not sufficiently developed for final review. The case presents itself as an interlocutory appeal of the District Court's denial of Petitioner's Motion for Temporary Restraining Order and Preliminary Injunction, finding that, as a matter of law, the relief Petitioners seek is not available under ERISA. In order to fully adjudicate this case, the District Court should have the opportunity to consider, among other issues: (1) the fact that Petitioners had not exhausted their administrative remedies; (2) that Petitioners' reliance claims are factually defective because Petitioners received only estimates, not promises on which they could justifiably rely; and, (3) that Formica breached no fiduciary duty in relying on an enrolled actuary's miscalculation of pension benefits.

REASONS FOR DENYING THE WRIT

I. The Issue of What Remedies Are Permitted Under ERISA § 502(a)(3) Has Been Conclusively Resolved by the Court's Prior Decisions.

The courts below held that Petitioners' breach of fiduciary duty claim under ERISA cannot succeed because, as relief, Petitioners seek compensatory damages that are not equitable in nature. (Sixth Circuit Opinion ("Opinion"), Petition Appendix A at 8a-9a; District Court Order ("Order"), Petition Appendix C at 19a). Since the Court's decisions in *Mertens* and *Knudson,* courts have unanimously held that ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3), does not allow an award of monetary or compensatory damages as

"other appropriate equitable relief."[1] *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993); *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 210 (2002). Petitioners asked the District Court to order Formica to pay pension benefits not at the level authorized by the terms of the Plan, but rather at the higher level that they had been historically overpaid. In declining to grant the requested relief, the courts below recognized the Court's holding in *Knudson* that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Knudson*, 534 U.S. at 210. In reaching this conclusion, the courts adhered to this Court's analysis that Petitioners, like Great-West in *Knudson*, do not seek equitable relief, but rather "seek[] legal relief - the imposition of . . . liability on respondents for a contractual obligation to pay money." *Id.* at 221.

Petitioners repeatedly have stated that they seek an award of the type of damages forbidden by *Knudson*. Petitioners'

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[1] *See, e.g., Michaels v. Breedlove, 2004* U.S. App. LEXIS 25165, at [*5-8] (3d Cir. 2005); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002); *Crosby v. Bowater Inc.*, 382 F.3d 587 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 3357 (U.S., Apr. 18, 2005); *Local 6-0682 Int'l Union of Paper, Allied-Industrial, Chem. & Energy Workers v. Nat'l Indus. Group Pension Plan*, 342 F.3d 606, 609 n.2 (6th Cir. 2003); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 547-48 (7th Cir. 2003); *Calhoon v. TWA*, 400 F.3d 593, 597-98 (8th Cir. 2005); *Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster*, 332 F.3d 1234, 1237-38 (9th Cir. 2003); *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 404-07, 409 (10th Cir. 2004); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1248, 1252-54 (10th Cir. 2004); *Flint v. ABB, Inc.*, 337 F.3d 1326, 1330-31 (11th Cir. 2003).

Motion for Temporary Restraining Order and Preliminary Injunction sought compensatory damages in the form of an order prohibiting Formica from paying the pension benefits due under the terms of the Plan, but instead requiring Formica to pay "the monthly pension benefit payments to Plaintiffs and each member of the putative class" that they had historically been overpaid. At the hearing on their Motion for Temporary Restraining Order and Preliminary Injunction, Petitioners' counsel stated "We're asking them to rip up the [pension] checks and just issue the checks in the amount they're supposed to be receiving." In summarizing their claim at the Preliminary Injunction Hearing, counsel for Petitioners stated:

> We believe the Court could fashion a remedy which would require the Plan Administrator . . . to resume the checks back to the original amounts that all the Plaintiffs were promised. That would mean making up two months of pay.

This relief is not available under ERISA. *See Knudson*, 534 U.S. at 210.

The District Court reached its legal conclusion wholly in line with *Knudson* and its progeny, even assuming the truth of Plaintiffs' factual assertions:

> Under § 1132(a)(3), only "appropriate equitable relief" is available, which means only those categories of relief traditionally available in equity. *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204 (2002). Money damages or compensatory damages, and punitive damages are not available under § 1132(a)(3). *Id. Community Ins. Co. v. Morgan*, 54 Fed. Appx. 828, 832 (6th Cir. 2002); *Allinder,* 152 F.3d at 552;

> *Local 6-0682*, 342 F.3d at 609 n. 2. Injunctive relief is equitable in nature, *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993), and, although Plaintiffs do seek an injunction, what they really want is to continue to be paid the monthly amount they were promised. In other words, Plaintiffs seek to recover their reliance interest in Formica's representations about their monthly benefits. Therefore, although at this point the claim for relief is couched in terms of injunctive relief, the ultimate relief sought by Plaintiffs is really money damages. Thus, Plaintiffs' claim for injunctive relief, as it now stands, is barred pursuant to the authorities just cited.

(Order at 19a). The District Court, giving Petitioners every benefit in broadly analyzing the First Amended Complaint, properly concluded that Petitioners' ERISA breach of fiduciary duty claim could not succeed because the only relief that Petitioners seek is monetary damages not authorized under ERISA § 502(a)(3).

Likewise, the Court of Appeals held that the "Act does not provide a cause of action for legal actions for monetary damages disguised as suits in equity." (Opinion at 9a (citing *Knudson*, 534 U.S. at 215-16)). Applying *Knudson*, the Court of Appeals stated:

> Here, plaintiffs request a restraining order; ordinarily, this is a form of equitable relief. However, plaintiffs ask the Court to direct Formica, or its pension plan, to pay monies, which are not owed, for an uncertain duration. . . . This form of relief is not authorized

> under the Act. Therefore, the district court correctly denied plaintiffs' motion.

(*Id.*)

Petitioners challenge this Court's unmistakable prior holdings by quoting at length from an *amicus* brief of the United States, which the Court has previously considered and rejected. Petitioners contend that the Court should abandon its rigorous fidelity to the text of § 502(a)(3), substituting a more generous interpretation based on Petitioners' vision of "settled trust-law understanding dating from the days of the divided bench." Petition at 9-11. These amorphous contentions ignore the plain meaning of the statute and the Court's fully developed analysis, beginning with *Russell's* recognition of "ERISA's interlocking, interrelated and interdependent scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Petitioners further complain that the Court, in its previous decisions, should have ignored ERISA's "comprehensive and reticulated" enforcement scheme in light of Congress's generalized statements that ERISA was intended to protect the interest of plan participants. Petitioners forget that ERISA's complex and detailed statutory scheme "resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262 (1993). The Court stated in *Knudson*:

> [A]s we explained in *Mertens*, "even assuming" . . . the lack of other means of obtaining relief, "vague

> notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." 508 U.S. at 261.

Knudson, 534 U.S. at 220 (italics in original). Because the courts below correctly analyzed Petitioners' claims in light of ERISA's statutory enforcement scheme, their decisions denying Petitioners' request for injunctive relief should not be disturbed. Petitioners' reliance on Justice Ginsburg's dissent in *Knudson* is emblematic of Petitioners' refusal to acknowledge the governing law with respect to their claims.

Petitioners offer nothing to support their contention that the courts of appeals are "in disarray" with respect to the scope of relief available under ERISA § 502(a)(3). On examination, their citation to two unreported cases is ineffective. In *Rubin-Schneiderman*, the Second Circuit reviewed the District Court's denial of plaintiff's request to amend his complaint to assert a fiduciary duty claim under ERISA § 503(a)(3). *Rubin-Schneiderman v. Merit Behavioral Care Corp.*, 121 Fed. Appx. 414, 416, 2005 WL 229862 at [*1] (2d Cir. 2005). Apparently the plaintiff had referred to § 502(a)(3) in his "wherefore" clause only. The District Court denied plaintiff's subsequent attempt to amend to formally assert a claim under that section of the Act. *Id.* After holding that plaintiff's common-law negligence claims were preempted by ERISA, the court remanded "for further consideration of Plaintiff's attempt at amendment of his complaint to assert a claim under ERISA § 502(a)(3)." *Id.* This holding does nothing to establish Petitioners' contention that the courts of appeals are in disarray on the issue of the relief allowable under ERISA § 502(a)(3).

In *Schaffer*, the other unpublished decision cited by Petitioners, the defendant conceded that it had breached its fiduciary duty under § 502(a)(3). *Schaffer v. Westinghouse Savanna River Co.*, 2005 WL 567812 at [*4] (4th Cir. 2005). Further, "at oral argument, [the defendant] expressly conceded that it was within a court's equitable powers" to require it to provide the plaintiff some relief. *Id.* at [*5]. The Fourth Circuit concluded that "[b]ecause the record lacks any basis for determining whether this equitable remedy is an 'appropriate' one, we must remand that question to the district court." *Id.*

The two other post-*Knudson* cases cited by Petitioners are simply irrelevant. *See Grigg v. DuPont De Nemours & Co.*, 385 F.3d 440, 449-52 (4th Cir. 2005) (holding that in certain circumstances, "rescission" can be an equitable remedy available under ERISA § 502(a)(3)); *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1185-87 (9th Cir. 2005) (upholding *Knudson*'s prohibition of money damages in awarding equitable relief).

Finally, as Petitioners admit, pre-*Knudson* decisions, such as *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999), which granted monetary relief, are inapposite in light of *Knudson*. Petition at 14-15 (citing *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 597-98 (8th Cir. 2005), for the proposition that *Knudson* forecloses the remedy in *Strom*). In short, none of the cases cited by Petitioners substantiates Petitioners' contention that the circuits are in disarray so as to require the attention of this Court. Accordingly, the Petition should be denied.

II. The Courts of Appeals Have Not "Overstated" the Breadth of ERISA Preemption, But Rather Are Unanimous in Their Application of ERISA's "Expansive Preemption Provisions," in Deference to the Plain Meaning of the Act as Conclusively Confirmed by the Court.

Petitioners acknowledge that the courts of appeals are now unanimous in their holdings that state-law tort claims for negligent misrepresentation and promissory estoppel, such as those alleged by Petitioners, are preempted by ERISA.[2] Petition at 16, 18. Nonetheless, Petitioners contend that the lower courts have "overstated" the breadth of the ERISA preemption. *Id.* Petitioners ignore that the courts of appeals have adopted their interpretation of the broad preemptive power of ERISA in compliance with the plain language of the statute, as repeatedly clarified by this Court. In the end, Petitioners urge the Court to ignore ERISA and adopt a restrictive reading of the Act on grounds previously considered and conclusively rejected by the Court.

Petitioners admit that "the authorities from the Sixth Circuit and numerous other courts, which have in the past allowed limited state-law claims such as those advanced by Petitioners to proceed, are evidently no longer good law." *Id.* at 18. Though Respondents submit that state-law claims such as those advanced by Petitioners have never properly escaped the preemptive power of ERISA, the Court's

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[2] *See, e.g., Haynes v. Prudential Health Care*, 313 F.3d 330, (5th Cir. 2002); *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 702 (6th Cir. 2005); *Anderson v. UNUM Provident Corp.*, 369 F.3d 1257, 1259 (11th Cir. 2004) (fraud); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1294-95, 1301 (11th Cir. 2001) (same).

unanimous holding in *Davila* last term definitively resolved any lingering confusion regarding ERISA's preemptive scope with respect to state tort claims. *See Davila*, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327.

ERISA § 514, *codified at* 29 U.S.C. § 1144, preempts state-law causes of action that, like Petitioners' claims, are directed against ERISA plans:

> [a]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted. *See* [*Pilot Life*,] 481 U.S., at 54-56, 95 L. Ed. 2d 39, 107 S. Ct. 1549; *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143-145, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990).

Davila, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327. ERISA's preemption provision, ERISA § 514(a), *codified at* 29 U.S.C. § 1144(a), provides in relevant part: "the provisions of this subchapter . . . shall supersede any and all State-laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. *Davila*, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327. ERISA includes expansive preemption provisions which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern. *Id. Accord Egelhoff v. Egelhoff*, 532 U.S. 141, 146-149 (2001); *Pilot Life Ins. Co. v. Dedeaux*, 41 U.S. 41, 45-46 (1987). The "integrated enforcement mechanism . . . is a distinctive feature of ERISA, and essential to accomplish Congress's purpose of creating a comprehensive

statute for the regulation of employee benefits plans." *Davila*, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327. The courts below correctly held that no likelihood of success existed as to Petitioners' state-law claims on the ground that they are preempted by ERISA.

A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or references such a plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Under this "broad common-sense meaning," a state-law may "relate to" a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). *Accord Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (employee's wrongful termination claim preempted by ERISA). Petitioners admit that their claim relies upon "the fact that the . . . inaccurate information provided by Formica was the amount of Petitioners' monthly benefits under the plan." Petition at 16. This admission is sufficient to assure that their claims are preempted.

Petitioners attempt to escape preemption by arguing that their state-law claims seek "a remedy from their former employer, Formica Corporation, . . . when inducing them to accept early retirement . . ., not the retirement plan." Petition at 16. The Sixth Circuit correctly addressed this argument:

> [I]t is clear that all of plaintiffs' state-law claims stem from the actions of Formica in processing of their benefit payments. Furthermore, the amount that Formica would owe, assuming relief is granted, is a function of how much the pension plan pays to each plaintiff. It is well established that such state-law tort

> claims are preempted by the Act. *See Pilot Life Ins. Co.*, 481 U.S. at 57 (state-law bad-faith claim preempted); *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 942 (6th Cir. 1995) (finding state-law claims for wrongful death, improper denial of benefits, medical malpractice, and insurance bad faith preempted *because defendants "were determining what benefits were available to [plaintiff] under the plan")*; *Cromwell* [*v. Equicor-Equitable HCA Corp.*], 944 F.2d [1272], 1276 [6th Cir. 1991] (holding state-law claims of promissory estoppel, breach of contract, negligent misrepresentation, and breach of good faith based on denial of benefits "are at the very heart of issues within the scope of ERISA's exclusive regulation").

(Opinion, Petition Appendix A at 7a-8a) (emphasis added).

Based on the application of the Plan, Petitioners' state-law negligent misrepresentation and promissory estoppel claims "relate to" Formica's pension plan. Therefore, ERISA preempts these claims. This Court should reject Petitioners request for the Court to grant certiorari to ignore the plain meaning of the statute, to disturb the unanimity of the courts of appeals, and to undo this Court's unanimous and conclusive holding in *Davila*.

III. The Record Is Not Sufficiently Developed to Warrant Certiorari.

The Court has consistently refused to consider controversies when the record has not been sufficiently developed. *See, e.g., Rufo v. Inmates of Suffolk Cty. Jail,* 502 U.S. 367, 387 n.10 (1992) (refusing to reach issue because record not fully developed); *Keller v. State Bar of*

Cal., 496 U.S. 1, 17 (1990) (same); *Illinois v. Gates*, 462 U.S. 213, 252-53 (1983) (same); *Pennhurst State School & Hosp. v. Romeo*, 457 U.S. 307, 329 (1982) (Blackmun, J. concurring) (same). The record is not fully developed because this matter is before the Court on an interlocutory appeal of the denial of Petitioners' request for injunctive relief. On this ground alone, certiorari should be denied.

The courts below correctly held that Petitioners were not entitled to injunctive relief. Both the District Court and the Court of Appeals found that Petitioners were not likely to succeed on the merits on purely legal grounds, because the monetary relief which Petitioners seek is not available under ERISA. The District Court also found that the issuance of the requested injunction would place innocent plan participants, who were not members of the putative class, at risk. (Order, Petition Appendix B at 20a-21a). Finally, the District Court found that the public interest would "weigh in favor of adhering to ERISA's enforcement scheme and against granting the injunctive relief requested by Plaintiffs." (*Id.* at 21a). Although the record clearly establishes that the courts below properly denied Petitioners' injunctive relief, a fully developed record would establish numerous other procedural, factual, and legal problems with Petitioners' claims, making certiorari review premature.

A. Petitioners Had Not Exhausted Their Administrative Remedies.

The courts of appeals uniformly hold that "the administrative scheme of ERISA requires a participant to exhaust his or her administrative remedies prior to commencing suit in federal court." *Costantino v. TRW, Inc.*, 13 F.3d 969, 974 (6th Cir. 1994) (quoting *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir.

1991)); *see also Springer v. Wal-Mart Assoc. Group Health Plan,* 908 F.2d 897, 899 (11th Cir. 1990); *Makar v. Health Care Corp. of Mid-Atlantic,* 872 F.2d 80, 82-83 (4th Cir. 1989). Not only does the legislative history of ERISA support this proposition, *see Amato v. Bernard,* 618 F.2d 559, 567 (9th Cir. 1980), but the relevant ERISA provision reads: "Every employee benefit plan shall . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133(2). *See Mason v. Continental Group, Inc.,* 763 F.2d 1219, 1226-27 (11th Cir. 1985), *cert. denied,* 474 U.S. 1087 (1986).

At the time of the District Court's decision, no Petitioner had exhausted his administrative remedies under the Plan. At the February 20, 2004 hearing, Petitioners' counsel recognized Petitioners' duty to exhaust ERISA's administrative remedies in stating that "[w]e intend to pursue on behalf of each and every one of our clients the ERISA administrative process that is set out in the letters that all of them received. . . ." Because Petitioners had not exhausted their administrative remedies, this case is not appropriate for certiorari.

B. The Facts Do Not Support Petitioners' Misrepresentation and Estoppel Claims.

Petitioners' reliance claims fail for numerous reasons. One Petitioner retired in the ordinary course, without any early retirement incentive. Those who participated in incentive plans received the consideration they expected and were promised. Finally, the representations as to pension amounts were identified as estimates rather than as specific promises.

Petitioner Boyd did not participate in any early retirement incentive, therefore he cannot maintain a misrepresentation claim. Of the remaining Petitioners, all but Ramsey, participated in the 1996 early retirement program in which the sole incentive was a bridge payment of "$1,000 per month to be paid to you until your 62nd birthday." (Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Opposition") Appendix A at 1b). No dispute exists that Formica made the bridge payments to the Petitioners.

Errors in pension benefits "estimates" are not misrepresentations that could support Petitioners' claim for breach of fiduciary duty under ERISA. *See, e.g., SmarTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 487, 502 (S.D. Ohio 2000) ("A statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment."); *Miami Packaging, Inc. v. Processing Systems, Inc.*, 792 F. Supp. 560, 565-66 (S.D. Ohio 1991) (no justifiable reliance on estimates known to be subject to change).

The documents provided to Petitioner Ramsey not only made clear that they were "estimates only," but also that Ramsey's "actual pension benefit will be calculated following [his] election to retire." (Opposition Appendix B at 4b). Similarly, the 1996 early retirement forms received by other Petitioners not only were captioned "Total Estimate," but noted: "The calculations for this estimate are **approximate** based on the current data available. The monthly amounts shown represent an **estimate** of the total benefit. . . ." (Opposition Appendix C at 5b, 6b) (emphasis in original). Simply put, Petitioners' claims predicated on inaccuracies in estimates, rather than guarantees, of pension benefits will not support a claim for misrepresentation, estoppel or ERISA breach of fiduciary duty.

C. Formica Breached No Fiduciary Duty to Petitioners in Relying on an Enrolled Actuary's Calculation of Pension Benefits.

Petitioners cannot establish that Formica breached any ERISA fiduciary duty when Formica relied on its actuary's erroneous calculations in informing Petitioners of their estimated retirement benefits. *See, e.g., Hart v. Equitable Life Assur. Soc'y,* 2002 U.S. Dist. LEXIS 22928 (S.D.N.Y. 2002), *aff'd*, 2003 U.S. App. LEXIS 19397 (2d Cir. 2003); *Kuehl v. Chrysler Pension Plan,* 895 F. Supp. 1147, 1155 (E.D. Wis. 1995); *Easa v. Florists' Transworld Delivery Ass'n,* 5 F. Supp. 2d 522, 528 (E.D. Mich. 1998). *See also Muse v. Int'l Business Machines Corp.,* 103 F.3d 490 (6th Cir. 1996) (only intentional misrepresentations support claim for ERISA breach of fiduciary duty), *cert. denied*, 520 U.S. 1240 (1997). *See generally* 29 C.F.R. § 2509.75-8, FR-11.

In short, courts recognize that a plan's reliance on an ERISA enrolled actuary's calculation of benefits in providing benefit estimates alternately implicates no fiduciary duty or violates no fiduciary duty. *See, e.g., Fitch v. Chase Manhattan Bank, N.A.*, 64 F. Supp. 2d 212 (W.D.N.Y. 1999); *Easa v. Florists' Transworld Delivery Ass'n*, 5 F. Supp. 2d 522, 528 (E.D. Mich. 1998); *Gramm v. Bell Atlantic Mgt. Pension Plan*, 983 F. Supp. 585, 593 (D.N.J. 1997); *Kuehl v. Chrysler Pension Plan*, 895 F. Supp. 1147, 1155 (E.D. Wis. 1995).

Due to the undeveloped record with respect to these issues, this Court should decline to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully Submitted

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APPENDIX A

March 11, 1996

Bruce Maybriar
6762 Oakland Ave.
Loveland, OH 45140

Dear Bruce:

This letter is to highlight the terms of the retirement incentive being offered to you by Formica Corporation. This incentive is being offered to production employees who have age and service equal to or greater than 90 years. The incentive is $1,000 per month to be paid to you until your 62nd birthday. This payment will be made monthly through payroll with statutory deductions, through the month in which you turn 62.

Attached is a Notice of Retirement and Release Agreement which must be signed in order for you to receive this benefit. Also attached is a benefit question and answer sheet which will be reviewed with you by a company benefits representative.

Per the Notice of Retirement and Release Agreement, you will have 45 days to decide whether you want to accept this retirement incentive and 7 days to revoke after signing.

Sincerely,

Peter Olmsted
Director of Human Resources

APPENDIX B

11. YOUR PERSONALIZED STATEMENT OF BENEFITS

PREPARED FOR: (1) B.F. Ramsey
SOC. SEC. NO.: (2) ***-**-****

The following statement compares the estimated benefits that would be payable to you if you retire as of December 31, 1986 under both the Special Retirement Program and under regular Plan provisions. These benefits are shown on the basis of a Single Life Annuity, the automatic form of payment for unmarried employees, and on the basis of a Life Annuity with a 50% Surviving Spouse Benefit, the automatic form of payment for married employees. Other forms of payment are also available for those vested under the "Rule of 65" that, if elected, would change the amounts shown below.

SINGLE LIFE ANNUITY

	Special Benefits		Regular Benefits
(a) Annual income	(12)	10,683.07	(6) 8,863.16
(b) Social Security	(13)	0	(13) 0
(c) Social Security bridge	(14)	7,113.60	$0
(3) TOTAL BENEFIT (a)+(b)+(c)		17,796.67	8,863.16
Special Service Supplement	(15)	12,366.67	$N/A

LIFE ANNUITY WITH 50% SURVIVING SPOUSE BENEFIT

	Special Benefits		Regular Benefits	
(a) Annual income for you *	(17)	9,632.92	(16)	7,991.91
(b) Social Security	(13)	0	(13)	0
(c) Social Security bridge	(14)	7,113.60		$0
(3) TOTAL BENEFIT		16,746.52		7,991.91
Special Service Supplement	(15)	12,366.67		$N/A

*Under both the Special Retirement Program and regular Plan benefits, your surviving spouse would receive a continuation of your pension under this form of Plan payment after your death. This benefit would equal 50% of the benefit you were receiving from the Plan. If your spouse is age 62, he or she may be eligible to collect Social Security. The Social Security bridge provided by the Program stops at the earlier of your reaching age 62 or your death.

The benefits provided on this statement are estimates only. Your actual pension benefit will be calculated following your election to retire.

APPENDIX C

MARCH 11, 1996

TOTAL ESTIMATE
AMERICAN CYANAMID COMPANY
FORMICA CORPORATION
EMPLOYEE RETIREMENT PLANS

Pension ESTIMATE for: BRUCE MAYBRIAR

Termination Date: 11/10/2001

Benefit Commencement Date: 12/1/2001

PER MONTH

OPTION	TO YOU	TO BENEFICIARY AFTER YOUR DEATH
Single Life Annuity	$1056.56	$0
10 Year, Certain & Continuous Option	$996.34	$Any unpaid portion of 120 monthly payments
50% Contingent Annuitant Option	$932.94	$466.47

PER MONTH

OPTION	TO YOU	TO BENEFICIARY AFTER YOUR DEATH
100% Contingent Annuitant Option	$834.68	$834.68

PENSION BENEFITS AGE 62

NOTE: The calculations for this estimate are **approximate** based on the current data available. The monthly amounts shown represent an **estimate** of the total benefit from American Cyanamid Company's Plan and Formica Corporation's Plan. The benefits shown do not reflect any reductions for the election of any optional pre-retirement death benefits. **All estimates are subject to changes in Plan provisions and Social Security law.**

Prepared by: Hope Reilly
Manager, Corporate Benefits
315-786-3576

BTR = Formica/pension guarantee